UNIVERSITY OF VIRGINIA
WILLIAM H. WHITE FOUNDATION

DEMOCRACY IN GOVERNMENT

BY

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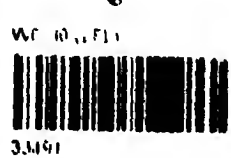

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THE WILLIAM H. WHITE FOUNDATION

This Foundation was established in 1922 by a gift of Mrs. Emma Gray White, widow, Mrs. Emma Gray Trigg, daughter, and W. H. Landon White and William H. White, Jr., sons, of the late William H. White, a distinguished alumnus and for many years a Visitor of the University of Virginia. The conditions require that the income be used in securing each session the delivery before the University Law School of a series of lectures, preferably not less than three in number, by a jurist or publicist, who is specially distinguished in some branch of jurisprudence, domestic, international or foreign; and that the lecturer present some fresh or unfamiliar aspect of his subject. Each series of lectures shall possess such unity that they may be published in book form.

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FIRST LECTURE.

I. The Individual and the State.

1. Democracy a Philosophy of Life.

Democracy is not a mere form of government. It is a philosophy of life, based upon the reality and worth of the individual. It views man as a spiritual being, having a value in and of himself, and not as so many foot-pounds of energy. It sees the welfare and happiness of man as the proper end and aim of all human institutions and believes that only through the free flowering of the human spirit can true welfare or happiness be attained. As President Roosevelt has recently said, it is essentially religious in character; and certain it is that no firmer foundation for the worth and importance of the individual can be found than in the concept of the immortality of the human soul, the fatherhood of God and the brotherhood of man. This philosophy finds its truest and most beautiful expression, I think in the teachings of Jesus of Nazareth as handed down to us in the Gospels. By the founder of this University, it was written into our national confession of faith in these noble words: "We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, * * *."

As a philosophy of life, democracy has not been the exclusive possession of any race or age. It goes back to the

beginnings of human history. It found expression in the life and literature of ancient Athens and of the free cities of the Middle Ages and was the dominant theme of the Renaissance and the Reformation. It did not assume practical importance in the modern world, however, until the American and French Revolutions had proclaimed anew the rights and liberties of the individual and governments had been established in which they were recognized. Since then, democracy has spread until it may truly be said to be the keynote of the civilization of the century that has gone by. To it must be ascribed not merely the intellectual awakening of that period but also an advancement in the physical well being of the race unparalleled in history.

He who doubts the value to the race of the concept of democracy should consider that in a century and a half under democracy man seems to have accomplished more than had been accomplished in all the countless ages that had gone before. In 1776, except for the invention of gun powder which had revolutionized warfare, men were living very much as they lived when Caesar conquered Gaul. We had no railroads or telegraphs or power driven machinery. The cotton gin had not been invented. The automobile, the airplane, the radio were not even dreamed of. Physics and chemistry were in their infancy. Medicine had progressed but little since the days of Hippocrates. It is customary to attribute the remarkable progress of the period to the growth of science and invention; but what caused the growth of science and invention? Is not the answer obvious? Democracy gave man a chance to express himself. It brought to the surface the dreams and the visions and the intellectual power which God vouchsafes to the poor and the humble among His children as well as to the great and the proud. Under the old system, the aristocrat had opportunity but lacked incentive; the peasant

had incentive but lacked opportunity. Democracy gave opportunity to the man with incentive; and progress beyond the wildest dreams of past ages was the result.

As Dr. Benes has recently pointed out,[1] the last world war developed eventually into a struggle between the nations that accepted the liberal democratic philosophy and those that denied it. The democratic nations were victorious; and it was thought for a while that the peace imposed upon the conquered would result in further application of the democratic principle Governments embodying the forms of democracy were set up in many states; and a League of Nations was created giving expression to the democratic aspiration for reason rather than force in the government of international relationships. But the years that have followed have witnessed the disappointment of the high hopes entertained at that time. The League of Nations has failed to preserve either peace or justice in international affairs. Some of the nations in which democratic forms of government were instituted have found themselves unable to administer democratic government efficiently as a result of the character and habits of their people. In some, the fundamental concept of democracy has been undermined by the propaganda of communistic elements, always opposed to any system of free enterprise. In others, democracy has been crushed by the old forces of state absolutism, which have utilized rising hostility to the communists as an aid in re-establishing themselves in power. In still others, as in the case of Czecho-Slovakia, democracy has been crushed by the "will to power" of totalitarian neighbors and ruthless disregard of treaty rights. So that from the high tide of hope which followed the triumph

1. "Democracy Today and Tomorrow," Eduard Benes, p. 27 et seq.

of the democratic forces in 1918, democracy finds itself now struggling for existence over a large part of the earth's surface. In nation after nation it has been crushed and repudiated; and in the world at large its validity as a sound philosophy of life is challenged as it has not been challenged since the days of the French revolution.

It is not my purpose in these lectures to enter into a general defense of the democratic philosophy of life. I may assume, I trust, that it is pretty generally accepted at the University of Virginia. I would call attention, however, to the importance of our maintaining inviolate the principles of democracy in government so that this great democratic nation may in the future, as it has in the past, furnish to the other peoples of the world an example to guide and inspire them in their struggle for freedom. If we are to do this, we must, in the first place, understand what the principles of democracy are and we must, then, apply them correctly to the solution of the problems which have arisen out of the rapidly changing conditions of our society. I shall speak, therefore, of "Democracy in Government," of the fundamental concepts which it embodies, and of their application to the changing conditions in which we find ourselves. This evening I shall speak of the relationship between the individual and the state, of the preservation of those basic rights and liberties of the individual which democracy envisages, and of some modifications in the concept of individual rights which have become imperative as a result of changed conditions. Tomorrow evening, I shall speak of the exercise of sovereignty in a democracy, of the proper theory of representative government, of the exercise of the popular will through our federal system and of the division of sovereign power between the three branches of government, with special reference to the growing necessity for centralization of power in the federal gov-

ernment and for the development of administrative tribunals for control of economic life. In my last lecture, I shall speak of the necessity in a democracy that there be government by law, as distinguished from government by force or arbitrary will, with an examination of the judicial process under the democratic theory and of the power and responsibility of the courts under our federal system.

2. THE INDIVIDUAL AND THE STATE.

The cause of most of the confusion in thinking about government is that the individual is more than an individual. He is at the same time a member of the organization that we call society. As Aristotle put it in his "Politics", man is a political animal The fallacy of some philosophers is that they practically ignore the social element in human life. This results in the policeman theory of government, or the doctrine of laissez faire. The fallacy of others is that they practically ignore the individual element, resulting in some form of state absolutism. The truth is, of course, that man cannot exist without the state and that the state cannot exist without man. The state is the organization of the social process; and through the proper exercise of its functions man enjoys a fuller and richer life and reaches a higher level of existence than would otherwise be possible. On the other hand, the social process that is organized is but the life of individuals and the organization cannot supply the function of that life. Effort must come from the individual; thought must come from the individual; ideals and aspirations arise in the minds of individuals; and the end of the social process is but the welfare and happiness of the individuals who make it possible. Care must be taken, therefore, that the state be given sufficient power to regulate matters of social concern and to undertake such business as the welfare of society demands and at the

same time that it be not allowed to trench upon the proper domain of individual effort so as to crush the initiative of the individual. I remember my professor of philosophy, wise and beloved Horace Williams of Chapel Hill, saying that despotism is merely the individual attending to the social business, while socialism is society attending to the individual's business. Democracy requires that society attend to the social business and let the individual attend to his own business. No line can be drawn *a priori* between the proper limits of state and individual action; and one of the most puzzling tasks of the lawyer or statesman is to properly delimit state action in the light of the rights of the individual and the changing conditions of society. But however difficult the task, its proper performance is of the essence of democracy as applied to government. As Dr. Benes has said:[2]

> "Every political system in the history of mankind has been judged on the basis of whether it has solved, justly and rightly, the problem of the relation between the individual as citizen and the state as the form in which every society must live; whether on the one hand the individual has had a sufficient degree of individual liberty to develop freely and to live a free, dignified life, and whether on the other hand the state has had sufficient power and a sufficient degree of influence to maintain a disciplined, ordered, and just society. If on the one side the degree of individual liberty was too great, the state fell into anarchy. If on the other side the degree of individual liberty was not sufficient and the state power was exaggerated, the result was absolutism and tyranny. In either case the inevitable result was revolution and complete failure.
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> *"There is no political system but democracy which is capable of solving justly and rightly this eternal problem in human society.* Democracy, in its nature and organisation, gives constant expression to the continual struggle of its

2. "Democracy Today and Tomorrow," Eduard Benes, 140.

citizens for just relations between the individuals and the collectivity. For this reason the entire political development of human society is practically the evolution to a higher and higher degree of democracy."

While isolated thinkers in the United States have from time to time subscribed to the *laissez faire* theory of the physiocratic school, it is well to remember that this has never been the philosophy upon which our government has proceeded. It was repudiated when the First Bank of the United States was organized, and the contrary doctrine was so well expressed in Hamilton's Report on Manufactures that as a practical matter we have never gotten away from his statement.[3] Even Mr. Jefferson, who is often referred to as an adherent of the *laissez faire* school, so far abandoned *laissez faire* when faced with the responsibilities of the presidency, that it is almost impossible to draw a line between his theories and those of Hamilton as to the proper functions of government.[4] The government has established a great postal system, regulated banking and currency, protected manufacturing through tariff duties, helped finance the great railroad systems, fostered agriculture in a hundred different ways, subsidized a merchant marine, constructed the Panama Canal, regulated the charges of public service corporations, undertaken control of floods in the rivers, spent hundreds of millions of dollars for relief of unemployment and has done countless other things demanded by the social welfare, for the doing of which we could not depend upon the individual. And so it has come about that, in our thinking, the government is not a mere policeman charged only with the duty of

3. Works, vol. III, p 250. Cf U. S v. Butler, 297 U. S. 1; Charles C. Steward Mach. Co v. Davis, 301 U S 548, 586, 587.

4. See "The Economic Philosophy of Thomas Jefferson" by Joseph Dorfman, Political Science Quarterly, vol. LV, p. 98.

preserving peace and order and letting economic and social forces work themselves out. We have accepted the view that it is the proper function of government, not merely to preserve peace and order, but to undertake any activity in behalf of society which the social welfare demands and which the individual either should not undertake because of the social interests involved or would not undertake because of its magnitude or for other reason. As President Lincoln expressed it: "The legitimate object of government is to do for a community of people whatever they need to have done, but cannot do at all, or cannot do so well, for themselves, in their separate and individual capacities."

The last half century has seen an unparalleled expansion of the functions of our government due to the industrial and social revolution which has occurred in the lives and habits of our people. Improved methods of transportation and communication, the invention of labor saving machinery, the introduction of new methods of corporate organization and financing—all of these have brought us face to face with new problems which call for greater regulation of national life by governmental power than the fathers ever dreamed of. Vast aggregations of capital have threatened a monopolization of industry with swollen fortunes for the few and economic serfdom for the many. The tools with which labor works have passed into the hands of capital, and laboring men have suffered a loss of the sense of independence and security which was theirs in former days. Organization for the protection of their interests has resulted in industrial conflict and shifts in industry have resulted in widespread unemployment. The whole fabric of economic life has become so complex that the misfortunes of one group of workers or producers may be the cause of nation-wide calamity. Under such circumstances it is idle to imagine that the power of the govern-

ment will not or should not be used for the proper regulation of economic life. Monopolies must be curbed. Unemployment must be relieved. Justice must be secured in the relations of capital and labor. Some measure of economic security must be provided by the state in the form of old age and unemployment insurance for those who are dependent upon industry of state-wide significance. And conditions must be fostered which will provide for the healthy growth of industry and the just division of its rewards. This expansion of the powers of government, however, need not and should not result in any denial of the fundamental rights of the individual. On the contrary, the justification for the exercise by government of such powers is that it is necessary to protect the individual from social forces under which he would otherwise be crushed and to insure him his fair share of the benefits arising from the social enterprise

It is of supreme importance, however, that with the expansion of the powers and functions of government we take care that the essential rights and liberties of the individual be preserved inviolate. The concept that the individual has certain rights of which not even the state may deprive him is more than the doctrinaire dictum of philosophers of the seventeenth and eighteenth centuries. It has been evolved by our fathers through nearly a thousand years of struggle. Freedom of thought, freedom of speech, freedom of conscience—the right to be secure in one's person and in one's home from unreasonable exercise of the power of government—the right not to be condemned for an act which was not a crime under the law of the state when committed—the right to public trial according to forms of law and to be confronted by the accusing witnesses—the right to immediate judicial inquiry into any deprivation of liberty—the right not to be deprived of property for public use without just com-

pensation—the right not to be deprived of life, or liberty or property but by the law of the land, the general law, "which," as Mr. Webster put it, "hears before it condemns, proceeds upon inquiry and renders judgment only after trial" [5]—these and others of which I need not speak had come by the time of the American Revolution to be regarded as the inalienable rights of the Englishman, which he might assert even against the power of the crown. When we achieved our independence and looked to the people and not the king as the source of sovereign power, we guaranteed these fundamental rights of the individual, not merely against the power of the executive, but against the entire power of the state, so that they might not be denied to any individual by any governmental officer, any legislative assembly, any popular majority—not even by the whole people themselves.

This guaranty, I think, was America's greatest contribution to the science of government. It solved the most troublesome problem of democracy by removing that rock upon which so many ancient democracies had perished, the tyranny of the majority. In simple words it means that while we recognize that political power is derived from the people and that popular majorities represent the people's will, we recognize also that government must represent justice and right as well as power, and that we will not permit the power of the state to be used to do injustice to the individual, to deny him those fundamental rights which in our concept belong to him as a man.

The first ten amendments of the federal Constitution guarantee these fundamental rights of the individual against infringement by the national government. The various state

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5. Argument in Dartmouth College v. Woodward, 4 Wheat. 518, at 581.

constitutions without exception protect them against infringement by the states. They are protected against state action also by the due process and equal protection clauses of the fourteenth amendment to the federal Constitution, which protect citizens of the United States in the enjoyment of their fundamental liberties against arbitrary action by the states. They may be grouped roughly into: (1) rights relating to the development and expression of personality, (2) rights relating to personal security and (3) rights relating to the ownership and enjoyment of property. It is of importance, I think, to look at the foundations of the rights embraced in each of these classes; to see what modification, if any, must be made in our thought regarding them; and to consider how they may be preserved amid expanding governmental powers and the changed conditions of modern society.

3. RIGHTS RELATING TO DEVELOPMENT AND EXPRESSION OF PERSONALITY.

From the standpoint of the happiness of the individual, as well as from that of the development of the life of society, no rights of the individual are more important than those relating to the free expression of personality, by which I mean freedom of religion, freedom of speech, freedom of the press and freedom of assembly, all guaranteed by the First Amendment to the Constitution of the United States. The essential dignity of man's nature depends upon his relation to the infinite, and this depends upon his right to worship God according to the dictates of his own conscience. The free expression of his thought and the right to share that thought with others are necessary to his intellectual growth and happiness. Free expression of views in the press and through the new medium of expression, the radio, is necessary for the dissemination of intelligence and the correction of error.

And the right to assemble to discuss matters of common interest is necessary to the effective expression of the views of the individual as well as to bring to bear on government the force of public opinion.

While all of these rights are of the first order of importance, I would speak particularly of freedom of speech, because it is always in danger Truth is apprehended in the mind of the individual. Its progress is slow and fraught with difficulties; and only through free expression can it hope to gain acceptance by the majority in the community. The history of human thought is one continuous process of the triumph of ideas which upon their first expression were condemned as error by the learned and the powerful Progress is dependent upon the advance of truth; and this in turn is dependent upon the right of men to give free expression to any views they may entertain. To the objection that free speech may lead to the propagation of error, the answer is that truth is able to take care of itself in a contest, and that, in an atmosphere of freedom, error will be detected and exposed and the truth will eventually prevail No wiser opinion was ever delivered than that of Gamaliel, who, when the teachers of Christianity were brought before him, said, "Refrain from these men and let them alone: for if this counsel or this work be of men, it will come to naught. But if it be of God, ye cannot overthrow it." [6] And as John Stuart Mill has pointed out in his Essay on Liberty, even where truth is accepted, it is benefited by free expression of opposing views. In contest with error, it becomes vital, a living force in the minds of those who accept it, rather than dead dogma imposed by authority. Who does not realize that the great

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6. Acts 5:38, 39.

political truths embodied in our free constitution are a greater force today in the lives of our people, just because of the fact that they have been challenged by the false philosophies of the totalitarian states of Europe?

Splendid expression of the philosophy underlying this right is to be found in the concurring opinion of Mr. Justice Brandeis in Whitney v. California, 274 U. S. 357, 375, where he said:

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people, that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Justice Brandeis refers in a note to the following quotations from Mr. Jefferson:

> "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge." Quoted by Charles A. Beard, The Nation, July 7, 1926, vol. 123, p. 8. Also in first Inaugural Address: "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

All of this should be self evident. It has been said by wise men so many times over in the world's history that I would apologize for saying it, were it not for the fact that there is such great temptation to forget it whenever an unpopular minority says something that strikes at the foundation of what we ourselves believe in. It is easy enough to believe in freedom of religion for Episcopalians or Baptists or Presbyterians. The test is whether we believe in that freedom for Mormons or Mohammedans or atheists. It is easy enough to believe in free speech for Republicans and Democrats. The rub comes when it is applied to communists and fascists and others whose teachings would subvert our institutions. We must never forget that unless speech is free for everbody it is free for nobody; that unless it is free for error it is not free for truth; and that the only limitations which may safely be placed upon it are those which forbid slander, obscenity and incitement to crime.

The recent history of Europe shows that in every one of the totalitarian states free speech has perished; and in my judgment there is no surer proof of the inherent weakness

of those states. There are some, however who seem to think that only by following their example can we deal with the complex problems of the age of machinery. They argue that centralization of power in strong hands is necessary for the direction of national life under modern conditions; that expert judgment should guide the policies of state; and that the government will be weakened by permitting the expression of views in conflict with its policies It seems to me that a sufficient answer is to be found in the mistakes those states have made when freed of the corrective force of free opinion. The liquidation of the Kulaks in Russia—the invasion of Poland by Germany—the war against Ethiopia—the blood purges which have decimated the ranks of their leaders—all of these would have been impossible if a free expression of the voice of the people could have been had. The truth is that the greater the complexity of the life of a people the greater the danger of error in the policies of the state, and the greater the need of the corrective influence of free expression of opinion. Likewise, as there is greater opportunity for autocratic exercise of power where life is complex, there is greater need of maintaining a party of opposition to exercise a curb upon the government and to supplant it in power if necessary.

We are to be congratulated that with the increase in the functions and power of our governments, state and national, our highest court has laid increasing emphasis upon these fundamental rights of the individual. It has brought them within the protection of the great general clauses of the Fourteenth Amendment.[7] It has ruled that laws forbidding free expression of unpopular political beliefs, even those sub-

7. Gitlow v. New York, 268 U. S. 652, 666; Near v. Minnesota, 283 U S. 697, 707; Grosjean v. American Press Co., 297 U. S. 233, 244.

versive of governmental institutions, will not be tolerated.[8] It has extended the freedom of the press to the distribution of tracts and handbills[9] and has said that distribution of these may not be forbidden by municipal ordinances relating to use of the streets[10] And it has made clear that freedom of assembly cannot be denied under guise of exercising the police power.[11]

A new slant is given the problem of free speech by the invention of the radio. The great radio broadcasts increase many times the importance of an expression of opinion by persons having the use of these facilities. A national leader can in one speech reach millions of people in every section of the country; and any favoritism or misuse of this wonderful instrumentality for the spread of opinion and knowledge may result in the gravest injustice. As the facilities for broadcasting are necessarily limited, the government must exercise supervision over them to prevent conflicts; and there is always danger that this may develop into a harmful censorship. By wise laws and efficient regulation, we must see to it that opportunity for use of these facilities is afforded all shades of thought among us and that nothing approaching a censorship is tolerated. Of course slander, obscenity, profanity and incitement to crime should be forbidden; but beyond this the industry should be allowed to regulate itself. The standards of taste of the American public can be depended on, I think, to insure a high and ever rising standard of radio programs.

It is well to note a danger existing in the present laws relating to the radio. Broadcasting stations are privately owned

8. Herndon v Lowry, 301 U S. 242.
9. Lovell v. City of Griffin, 303 U. S. 444.
10. Schneider v New Jersey, 308 U. S. 147, 60 S Ct. 146.
11. C. I. O. v. Hague, 307 U. S. 496.

and are operated for profit. The Federal Radio Commission is given plenary power over the existence of the stations by the requirement that, as a condition of their operation, the Commission issue to them certificates of convenience and necessity. If in the exercise of this power the Commission is permitted to take into consideration the character of the broadcasts, it is clothed with the most effective form of censorship; for private owners will be careful not to permit broadcasts which might offend the Commission and lead to failure to renew certificates. That this danger is not imaginary is shown by cases recently before the Court of Appeals of the District of Columbia.[12] Without questioning the decisions of the court in those cases, I think I may say that they point to a real difficulty. As was well said by Mr. Giles J. Patterson in his recent book:[13]

> "It would be difficult to conceive of a more rigid type of censorship than that which can be exercised by the Commission over radio broadcasting if the standard by which it is to determine whether to grant or refuse a license is none other than 'public necessity, convenience and interest.' That which renders the effect of such a claim potentially dangerous is that the members of the Commission are political appointees, subordinate to the Chief Executive. They have not even the standing of the Postmaster General, who was, under the Espionage act, given power to deny second class privileges to mailing matter. The latter is a cabinet member, and responsibility was definitely fixed upon him and upon the Administration. The attitude of subordinate appointive officers toward criticism of the party in power or toward the appointing officers will always reflect the resentment which officials feel toward criticism,

12. KFKB Broadcasting Association v. Federal Radio Commission, 47 F. 2d 670; Trinity Methodist Church South v. Federal Radio Commission, 62 F 2d 850.

13. "Free Speech and a Free Press," Giles J. Patterson, p. 226.

and as they are the prosecutors as well as the judges, a trial of the facts before them is far less effective for the protection of the individual rights than the trial of such facts before a branch of the judicial department."

Another angle to the problem of free speech is presented in the field of public education. It is obvious that the teachers in our schools, colleges and universities must have a tremendous influence on the thoughts and ideals of the rising generation; and many well meaning people, for that reason, favor a restriction upon their right to speak the truth as they see it. The question of academic freedom is not an "academic" question, as those of us who have served on boards of trustees know too well. On the one hand, we must deal with those who see in every expression of opinion out of harmony with their views of life a threat to our civilization, and on the other hand with academic exhibitionists who seek to attract attention to themselves by shocking the consciences of the sober members of the community. And then, occasionally, the "world savers" come along and seek to save Christianity or the Constitution or our system of free enterprise by having the legislature pass a law to restrict the teaching in the schools. Tennessee passes an act to forbid the teaching of evolution; and Massachusetts, not to be outdone, prescribes a test oath for teachers. The argument is made—and seriously accepted by more intelligent people than you would imagine—that since the people support the schools, the people should control what is taught in them. This is just as though it were argued that because the people support the courts they should say in a particular case how the judge should decide.

I need not argue, I am sure, that popular education is the hope of democracy. So far as democracy is concerned, popular education holds in its hand the key of the future; and every argument that can be made for freedom of speech generally

can be made with ten fold force in favor of academic freedom. In the schools and colleges the leaders of the future are being trained, the standards and ideals of the people are being forged, and there, if anywhere, the human intelligence must have free play. It is a sad day for any institution of learning when it turns out of doors any of its teachers for what he has said or taught; for this is a warning to those who remain that, as they value bread and reputation, they must tread the beaten paths of mediocrity, turn aside from the golden quest of truth and bury within their hearts any thought out of harmony with the past. It is better that the heathen rage and that the people imagine a vain thing than that this fate overtake an institution of learning What it can mean to the intellectual life of an entire people is graphically illustrated by what has happened to the German universities in recent years.

On the other hand, there is something to be said for the point of view of those who are offended by the "carryings on" of the professors of some of our universities. The mind of youth is impressionable; and no greater injury can be done a man than to strip him of his faith and give him no material out of which a new faith can be builded. And then, too, not all the stuff that the public disagrees with can be said to be "truth seeking expression". Most of it is error which has been exposed as such many times over, and which the half baked exhibitionist professor either has not discovered to be error or is willing to use, notwithstanding that fact, for the purpose of attracting attention to himself. The man who engages in this sort of business does much harm.

Let me suggest that the remedy here must rest primarily with the teaching profession. The teachers themselves should develop a code of ethics which will meet the situation and relieve institutions of learning of the embarrassment which they have all too frequently experienced in the past.

A teacher should no more use his class room for propaganda than a judge should use his charge to the jury for that purpose; and the exhibitionist teacher, or one who seeks to spread propaganda in his class room, should receive the contempt of his fellows in the same way that a judge who would make a political speech from the bench would receive the contempt of the legal profession Truth should be taught freely and fearlessly, but reverently and decently; and when taught in this way there will be little occasion for criticism even on the part of those who may not agree with the teacher. But, under no circumstances, should the power of the state be used for the curtailment of academic freedom Freedom of speech is the very life of democracy. Academic freedom is the life of intellectual progress, without which democracy will sink to the dead level of mediocrity.

4. RIGHTS RELATING TO PERSONAL SECURITY.

The rights relating to personal security are the right of public trial, the right of trial by jury, the right to be confronted by and to cross-examine witnesses, the right to have witnesses and counsel for one's defense and not to be required to give evidence against one's self, the right to have imprisonment judicially inquired into by writ of habeas corpus, the right to bear arms, the right to be free of unreasonable searches and seizures, the right to due process of law generally and the right not to be punished for an act which was not forbidden as a crime when committed. There is nothing in the changed conditions of society which indicates that any of these rights should be modified or abridged. The technicalities of common law procedure should, of course, be eliminated. Indictments should be simplified and the rules of evidence should be modernized; but the fundamental rights above enumerated are just as important to the preservation

of human liberty today as they were when the Republic was founded.

No one, I think, except the leaders of totalitarian states, who may need to put rivals out of the way by means of a blood purge, will doubt the importance of preserving the right to public trial. It is fashionable in some quarters, however, to speak disparagingly of trial by jury; and in this connection I wish to say that experience on the bench and at the bar for more than a quarter of a century convinces me that no better method of trying issues of fact, particularly in criminal cases, has ever been devised. But this is not all; no stronger bulwark, in my judgment, can be devised for protecting the innocent from oppression at the hands of the powerful. The jury system means that the people themselves sit in judgment when the state attempts to deprive an individual of life or liberty. To legislators they have delegated the making of laws. To the executive they have delegated enforcement. But the important matter of judging the guilt or innocence of a fellow citizen whose life or liberty is at stake, they have delegated to no one but have reserved to themselves, the jury not being elected or appointed, but chosen by lot from the body of the citizenship. The great importance of this in ordinary times is not readily appreciated; but when there is abuse of authority on the part of those in power, the value of this appeal to the conscience of the people is incalculable. History is replete with instances where political persecutions have failed because a jury of the people would not lend itself to tyranny, the case of John Peter Zenger,[14] tried in New York in 1769, being an outstanding

14. A Brief Narrative of the Case and Tryal of John Peter Zenger (1769) Patterson "Free Speech and a Free Press", p. 108. Life of Andrew Hamilton in "Great American Lawyers", Lewis.

example. The right to be confronted by and to cross-examine accusing witnesses and to have witnesses for one's defense are, of course, necessary concomitants of any proper jury trial.

Not only have these rights been scrupulously maintained by the decisions of our courts, state and national, but recently there has been an important enlargement of the right to the assistance of counsel at the trial. This had always been understood to mean the right of the prisoner to have counsel represent him in his defense if he was able to secure counsel, a right denied an accused charged with treason or felony until comparatively late in English history. Two years ago, however, in Johnson v. Zerbst, Warden,[15] the Supreme Court of the United States construed the constitutional guaranty as meaning that an accused in a federal court is entitled to have counsel appointed by the court to represent him, unless he knowingly and intentionally waives the benefit of the right The correctness of this decision in the light of modern conditions cannot be questioned. An ignorant defendant is in no position to conduct his defense in a modern court. The prosecution is represented by a skilled attorney and his staff of assistants. The offense charged may, and frequently does, involve complicated statutes and administrative rulings. The defendant should have his side of the controversy adequately presented, if there is any side to present; and whether there is or not, can be determined only by a man skilled in the law who will examine the case from the standpoint of the defense. The Conference of Senior Circuit Judges has recommended that provision be made for public defenders; but until such time as adequate provision is made for them, this decision of the Supreme Court will guarantee that, in the federal courts

15. 304 U. S. 458.

at least, the poverty of one accused of crime will not deprive him of a fair presentation of his case.

In like manner the meaning of the guarantee against unreasonable searches and seizures has been expanded by the Supreme Court. This constitutional provision is founded on Lord Camden's decision in Entick v. Carrington, 2 Wils. 275, 19 State Trials 1030, and the experience of the Colonists with the infamous "writs of assistance", empowering revenue officers to search suspected places for smuggled goods, which James Otis denounced as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law book" since they placed "the liberty of every man in the hands of every petty officer".[16] Many courts have held that it is no objection to the admissibility of evidence that it is obtained by officers of the government in violation of the constitutional rights of the citizen The Supreme Court has laid down the salutary rule, however, that evidence obtained in violation of these constitutional provisions shall not be received,[17] thereby saying, in language which no court or administrative officer may ignore, that it is better that a guilty man escape punishment than that the administration of justice be based on invasion of his constitutional rights. A somewhat similar ruling has been made in the wire-tapping cases, where, however, the act of the officers was violative of a right of privacy not covered by the Constitution but by Act of Congress.[18] Wire tapping could not be foreseen at the time of the adoption of the Fourth Amendment for the reason

16. Cooley's Constitutional Limitations, 7th Ed., p. 426

17. Boyd v. U S, 116 U S. 616; Gouled v U S., 255 U. S. 298.

18. Nardone v. U S., 302 U. S. 379; on second appeal 308 U. S. 338, 60 S. Ct 266.

that wires were not then used as a means of communication; but wire tapping is just the sort of pernicious invasion of privacy which it was the purpose of the Fourth Amendment to forbid, and it speaks well for the devotion of our people to the principles of liberty that this sort of governmental oppression was forbidden as soon as it had well manifested itself. We have adopted the dictum of Mr. Justice Holmes in his dissenting opinion in the Olmstead case (277 U. S. at 470) "* * * for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part".

Time is lacking to discuss the importance to personal security of the guaranty of due process and equal protection. In case after case, the Court has made it clear that a conviction will not be sustained where an accused has been denied the requisites of a fair trial. No man has been too humble, no cause too obscure, to invoke its power, once it has been shown that the citizen has been denied his rights by government under forms of law. Conviction of an accused on evidence wrung from him by third degree methods has been set aside with the remark that "the rack and the torture chamber may not be substituted for the witness stand".[19] Another conviction of friendless colored men has been set aside because colored citizens were excluded from the jury box.[20] Another conviction has been reversed because counsel were not given adequate opportunity to present their defense.[21] Etc.

Compare this careful regard for the rights of the individual with the new German doctrine that the courts shall punish offenders not punishable under the code if found to be de-

19. Brown v. Mississippi, 297 U. S. 278; Chambers v. Florida, 309 U. S. 227, 60 S. Ct. 472.

20. Norris v. Alabama, 294 U. S. 587.

21. Powell v. Alabama, 287 U. S. 45.

serving of punishment "according to the underlying idea of a penal code or according to *healthy public sentiment*". I quote from an article in the London Times of July 5, 1935, quoted by Prof. McIlwain at p. 269 of his Constitutionalism and the Changing World:

> "A principle entirely new to German jurisprudence has been introduced by the Penal Code Amendment Law, which was one of the batch of laws published by the Reich Cabinet on June 26 and is promulgated today in the official Gazette. It is that the Courts shall punish offenses not punishable under the code when they are deserving of punishment 'according to the underlying idea of a penal code or according to healthy public sentiment (Volksempfinden)'. If no penal code applies directly, such an offense is to be punished according to that law the underlying idea of which best fits it. . . .
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> "Dr. Hans Frank, Reich Minister without portfolio and former Reich Commissar for Justice, explains in a newspaper article that the new principle does not mean that anyone against whom a charge is brought in future in Germany is to be regarded from the outset as guilty, or that the rights of the defense will be impaired. The National Socialist State, he says, knows very well how to distinguish between criminals who are of thoroughly evil character and a pest to the community and small, harmless, everyday sinners. The Judge is not given unrestricted powers to condemn all and sundry in every case; he is invested with a proud power of decision which confers on him as representative of the National Socialist world-outlook and the healthy German public sentiment the role of a people's judge in the finest meaning of the term. Dr. Frank declares the new law to be a landmark on the road to a National Socialist penal code."

5. RIGHTS RELATING TO OWNERSHIP AND ENJOYMENT OF PROPERTY.

Despite the preachments of the followers of Karl Marx,

the right of private property is still fundamental in the happiness of the individual and the welfare of the state. There has been much unintelligent abuse of the profit motive, but the fact remains that the two great incentives to human action are still hope of reward and fear of punishment. The right to private ownership of property is based upon the first of these, and calls forth effort in the production of wealth by the assurance that he who produces may use and enjoy. When this incentive is taken away, all that remains is fear of punishment; and it is no mere coincidence, I think, that in the states which have attempted to abolish private property, punishment by law is provided for inefficiency, and the severest penalties are visited upon failure in the management of industry. The right of private property is fundamental, therefore, in a system of free enterprise State slavery, in which fear of punishment supplants hope of reward as the incentive of effort, is the inevitable consequence when the right of private ownership is denied.

I shall enter into no discussion as to whether the right of private ownership is a natural right arising from the nature of man, as Locke believed,[22] or whether it is a right created by the law of the state. As man is a social being, the argument comes to the same thing in the end; for a right does not lose the quality of a natural right because it arises out of the nature of man's social relationships rather than out of the nature of his physical being. The man who goes into the wilderness, clears the forest and builds himself a home seems to me to have a better right to that home than any other man living; and his right does not seem less important, but more important, because of the fact that the society in which he is

22. Locke, John "The Rational Basis of Private Property" in Book II of "Two Treatises of Government", Ch V. Coker, Francis William, "Readings in Political Philosophy", 537 et seq

living recognizes the right and protects him in its enjoyment. Likewise the laborer who saves his wages and buys a home seems to me to have a right to it. And I see no difference between his buying a home with his savings and using them to erect a shop and buy tools with which to earn even larger wages by serving his neighbors. And I see no difference between this and using his savings to buy a share of stock or a bond, and thereby pool his money with the money of others for purposes of production. The right of men to enjoy and exercise dominion over property which they have produced or discovered or acquired by trade arises out of the sense of natural justice imbedded in man's nature and has been recognized in practically every nation and by every legal system that has ever existed anywhere or at any time in the world's history. Even communist Russia has not been able to get along without a partial recognition of the right.

What has not been recognized so clearly until recently, however, is the social aspect of property; and much friction has resulted from the failure on the part of many to understand that, where the use of property affects the welfare of society, that use must be subjected to control by the state in the interest of the common good Generally speaking, how I deal with property which is acquired and held for individual use, is no concern of the state. How I shall dress, what I shall eat, what sort of house I shall live in, are matters of individual concern. When I invest my money in a railroad or in an insurance company to serve the public, however, the public has an interest in the sort of trains I run, or the rates I charge, or the labor conditions that I maintain. This is true of any business affected with a public interest. The tendency to write the social statics of Herbert Spencer into the interpretation of the Constitution has been abandoned; and it is clear, as pointed out by the Supreme Court in Nebbia v. New

York, 291 U. S. 502, 536, "that there is no closed category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory * * *. The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good * * * there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the production or commodities it sells."

The same considerations, of course, limit freedom of contract. Thirty years ago, in Chicago, etc., R. C. v. McGuire, 219 U. S. 549, 566, 567, the Supreme Court said.

> "It has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution. Allgeyer v. Louisiana, 165 U S. 578; Lochner v. New York, 198 U. S. 45; Adair v. United States, 208 U. S. 161. In Allgeyer v. Louisiana, supra, the court, in referring to the Fourteenth Amendment, said (p. 589): 'The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.' But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom

to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

In West Coast Hotel Company v. Parrish, 300 U. S. 379, this language was cited with approval by the Supreme Court which further elaborated the idea as follows:

"The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. This essential limitation of liberty in general governs freedom of contract in particular."

Many cases applying the principle are cited by the Supreme Court in support of its statement of the rule; but it would unduly prolong the discussion to review them here. One phase of the limitation is of special interest at this time. I refer to the statute protecting the right of collective bargaining on the part of employees. Such statutes were held unconstitutional in Adair v. United States, 208 U. S. 161, and Coppage v. Kansas, 236 U. S. 1. These cases were virtually overruled, however, by Texas & N. O. R. Co. v. Brother-

hood of Ry. & S. S. Clerks, 281 U. S. 548, and The National Labor Relations Act cases, 301 U. S. 1. The protection of collective bargaining is now upheld as a proper exercise of governmental power and contracts in derogation thereof are held invalid.

But notwithstanding this power of the state to regulate the use of property and the limitation placed upon freedom of contract in the interest of the social welfare, the private ownership of property and the right to contract with reference thereto are and must continue to be recognized as rights of the individual of which he may not be deprived by the state through arbitrary or discriminatory action. The state may say how my property shall be used when I invest it in a business charged with a public interest, but I cannot be deprived of it because I am a Jew or a Catholic or because I am rich or unpopular; nor can the state forbid me to use it as I will, except by legislation having reasonable relation to the public welfare. No matter how complex society may become or how many problems may be introduced by the machine age, man should not be deprived of his property any more than of his life or liberty but by "the law of the land". And this means as Mr Webster pointed out, that "every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society" [23]

6. DANGER OF STATE ABSOLUTISM.

Democracy, then, is based upon the reality of the individual. Democracy in government requires the recognition of the rights of the individual in the organized life of society which we call the state. Growth in the complexity of social

23. Argument in Dartmouth College v Woodward, 4 Wheat. 518, 581

life means that the state must assume new functions, both because added regulation is required to protect the individual and because new activities are required in the interest of society which only the state is in position to undertake. We must not forget, however, amid expanding governmental powers, that the state exists for man, not man for the state; that the end of government is that men may be secured in the rights of life and liberty and the pursuit of happiness; and that the powers of the state should never be permitted to encroach on those rights of the individual—the right of security, the right of property, the right of free expression of personality—which are essential to his life, his happiness and his development. The greatest danger that confronts civilization is that the individual may be crushed by the state. As said by José Ortega y Gasset, the great liberal philosopher of the University of Madrid,[24]

> "This is the gravest danger that today threatens civilisation. State intervention; the absorption of all spontaneous social effort by the State, that is to say, of spontaneous historical action, which in the long run sustains, nourishes, and impels human destinies. When the mass suffers any ill-fortune or simply feels some surging appetite, its great temptation is that permanent, sure possibility of obtaining everything—without effort, struggle, doubt, or risk—merely by touching a button and setting the mighty machine in motion. * * *
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> "The result of this tendency will be fatal. Spontaneous social action will be broken up over and over again by State intervention; no new seed will be able to fructify. Society will have to live *for* the State, man *for* the governmental machine. And as, after all, it is only a machine whose existence and maintenance depend on the vital supports around it, the State after sucking out the very marrow of

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24. "The Revolt of the Masses" pp. 132-133.

society, will be left bloodless, a skeleton, dead with that rusty death of machinery, more gruesome than the death of a living organism.

"Such was the lamentable fate of ancient civilisation. No doubt the imperial State created by the Julii and the Claudii was an admirable machine, incomparably superior as a mere structure to the old republican State of the patrician families. But, by a curious coincidence, hardly had it reached full development when the social body began to decay."

The same thought is eloquently expressed by André Siegfried, Professor at the College de France, in the last issue of "Foreign Affairs", where he says: [25]

"The spirit of the West is free, as free as the flowing stream, the living flame. Western civilization will die the moment it surrenders the freedom that is part of the air it breathes. It will lose the creative energies that have enabled it to be great. It will become a lifeless mechanism Perhaps too late we shall perceive that the most perfect technical plant imaginable cannot function unless it is animated by a spirit"

The curse of totalitarianism is that it sacrifices the individual to the state. The glory of democracy is that it seeks the welfare of the state in the dignity and happiness of the individual.

25. "War for Our World" Foreign Affairs, vol. 18, p. 418.

SECOND LECTURE.

II. The Exercise of Sovereignty.

1. The Nature of Sovereignty.

The nature of sovereign power has been the subject of much controversy. I shall not enter into the controversy further than to say that I agree in general terms with Bodin, Hale and Prof. McIlwain rather than with Hobbes, Filmer and Austin. Sovereign power is the supreme power of the state. It is not arbitrary power, however, as Hobbes and Filmer thought, but is limited by the nature of the state. As early as 1756, it was correctly conceived by Bodin, whose teaching is thus succinctly summarized by Prof. McIlwain:[1]

> "In every royal monarchy, which to Bodin means every monarch with free men and not slaves as its subjects, and to him both England and France were such; in fact, in every association of men whatever which is truly political, what makes it a state is the existence of a government; but not any government. It must be a government animated by justice and founded upon law. Otherwise the association will be no better than a band of robbers, and will, in fact, be a robber band instead of a true respublica or commonwealth. To be a true state, it *must* be founded in law. It must therefore have a lawful framework, a form of the state, a constitution, and this must be an embodiment of right and justice."

The democratic concept is that this sovereign power, the supreme power of the state, rests in the people. Governments, says the Declaration of Independence, derive their just powers from the consent of the governed; which is the same as saying that the governed are the repository of power. Government is but the agency of the people for exercising the

1. "Constitutionalism and the Changing World", p. 72.

sovereign power which they possess. Public officers are but their agents for exercising that power in accordance with law. The idea was well expressed by Chief Justice Jay in Chisholm v. Georgia,[2] where he said:

> "Sovereignty is the right to govern; a nation or state-sovereign is the person or persons in whom that resides. In Europe, the sovereignty is generally ascribed to the prince; here it rests with the people; there the sovereign actually administers the government; here, never in a single instance; our governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns Their princes have personal powers, dignities and pre-eminences, our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens."

And this is not mere theory. The people in a country such as ours really do have supreme or sovereign power They elect the officers of their government or provide for their appointment; and an officer who does not hold their support fails of re-election or may be removed or impeached. They have it within their power to change even the form of the government itself. It is true, of course, that it may take time for changes to be made; but this is in order that reason may be given opportunity to assert itself, not that plenary power does not reside in the body of the people.

But, as pointed out by Bodin, the supreme power is not arbitrary. It arises out of the law of life of the state. The state is not a mere aggregation of individuals, but an organism. What we may call natural law, of which I shall speak at greater length tomorrow evening, is the life principle of that organism, the imperative inherent in the life of man and

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2. 2 Dallas 419, 472.

of the state which determines the relationship of the state to the citizen and of citizens to each other, and prescribes the conduct which must be followed in the interest of the common good. Sovereign power must be exercised by the state in accordance with this natural law; and what we call constitutional law is but the statement of the principles upon which sovereign power is exercised. We in the United States have embodied these principles in a written constitution, which operates as a grant and limitation of powers binding upon the agents of the people I shall not speak this evening of the exercise of sovereignty in democracies generally, but shall take the Constitution of the United States as embodying in very nearly ideal form the principles governing the exercise of sovereignty which a democracy should follow. I shall address myself particularly to the representative principle, the federal system, and the division of powers.

2. THE REPRESENTATIVE SYSTEM.

Ancient democracies involved direct participation by the citizenship in the processes of government; and our system of government by representatives of the people has frequently been defended on the ground of necessity, the argument being that in so large a country direct participation by the citizenship, while desirable, is not practicable. It is true, of course, that direct participation by the citizenship in the governing process is not practicable; but the representative system rests upon a much sounder basis than that the alternative is not workable. It is desirable in itself even if it were possible to obtain direct expression of the citizenship on governmental matters. Government must rest upon reason as well as force. Popular elections place behind government the force of society, but they are not adapted to bringing to bear upon the problems of government the reason that is

necessary for their solution. The great majority of citizens have neither the time nor the information necessary to conduct the government efficiently; and particularly is this true today when government regulation of economic life necessarily involves expert knowledge and diligent application. Representatives of the people, however, can exercise the knowledge and deliberation which governing requires; and the fact that they are acting in behalf of the people and are answerable to them preserves in the people themselves the essential attribute of sovereignty. *Qui facit per alium facit per se.* Such a system is absolutely necessary, I think, if popular government is to be efficient; and it must be efficient if it is to survive.

It is generally acknowledged that within its sphere our federal government is more efficient than the government of most of our states; and I think that this is precisely because our federal Constitution has maintained the representative system as the fathers conceived it. In many of the states, the strength of the legislative branch of government has been impaired by the initiative and referendum In most of them the efficiency of the executive has been largely destroyed by multiplying elective offices with consequent loss of unity and responsibility. In thirty-eight of them the independence of the judiciary has been greatly weakened by popular election of judges.[3]

There was a time when the chief problem of democracy was to get a hearing for the popular voice. Its chief problem today is to make itself efficient; and in the interest of efficiency what is needed is a more scientific application of the representative principle. We should make serious inquiry,

3. Report of Special Committee of American Bar Ass'n on Judicial Selection and Tenure, vol. 63 Reports of American Bar Ass'n, 406, 435.

for instance, as to whether, under modern conditions, there is any real need in our state governments for the bi-cameral system or for such large legislative assemblies as exist in most of the states. The business of the states is very largely local administration; and it may well be that a single house of limited membership, such as has recently been provided in Nebraska, would handle the state's business and attend to its lawmaking much more efficiently than the large bi-cameral bodies prevailing in most of the states. Certainly, in any state, compact committees, or legislative councils, such as have been appointed with success in a number of states,[4] might give consideration to legislative programs in advance of the meeting of the lawmaking body, compile the experience of other states with respect to proposed legislation, grant hearings at which interested persons might express themselves, and present to the lawmaking body, when it meets, drafts of bills which have been carefully prepared in the light of existing knowledge. The hit or miss legislation in which too many legislatures indulge has nothing to commend it; but the remedy is not the initiative and referendum, which are worse in that they carry legislation from the council chamber to the hustings, but the introduction of greater efficiency into the legislative process.

In the executive departments of the states, what is needed is the principle of the short ballot, or the appointment of executive officers by the governor. Virginia is probably the best governed state in the South today; and the reason for it, in my judgment, is Virginia's adoption under the leadership of Senator Byrd of the principle of the short ballot in her state government. Commenting on the working of the

4. Such legislative councils are provided for in Connecticut, Illinois, Kansas, Kentucky, Maryland, Michigan, Nebraska and Virginia.

plan Senator Byrd had this to say:[5] "Under the New Constitution the members of the State Corporation Commission are elected by the General Assembly, this being at least a semi-judicial office. The General Assembly elects all of our judges. We abolished the office of Secretary of the Commonwealth, and gave to the Governor the appointment of the Commissioner of Agriculture, Superintendent of Public Instruction, and the State Treasurer. We now elect only the Governor, Lieutenant-Governor, and Attorney General. The Auditor of Public Accounts is elected by the General Assembly as a check on the Governor The plan has worked admirably, and the Governor of Virginia now has a cabinet just as the President of the United States has. It is entirely consistent with representative democracy as it merely gives to the Governor the appointment of the executive officers subject to the confirmation of the Senate and the House."

The success of popular government depends in very large measure upon the efficiency of the executive department and upon holding that department accountable to the people. The duty of the executive is to enforce the laws and administer the business of the state; and for the proper performance of this duty it is necessary that the executive have the energy which can come only with unified action To prevent abuses of governmental power, those responsible for governmental action must occupy such a position that they will be constantly in the public view. For both of these reasons, it is highly important that the entire executive power be intrusted to the chief executive officer of the state. Centralization of power in him gives unity and energy to the executive and secures efficient administration of the state's affairs. Centralization of power means centralization of responsibility also; and the chief executive vested with such power is held responsible by

5. In a letter of March 15, 1932, to the author.

the people for the entire administration of the government. A governor charged with such responsibility will hold the executive officials under him up to a high standard of efficiency. By reason of his power over them, he can and will impart unity and energy to their action. A sufficient check upon this power is the realization that, because of his position, everything which he does must be done in the full view of the people to whom he is accountable.

The correctness of thus centering power and responsibility in executive officials is universally recognized in our local governments and in our private business. No private business could live if the stockholders should take out of the hands of the manager the selection of department heads and other minor officials Inefficiency results from divided authority in the state's business just as in private business. In private business such inefficiency results in bankruptcy; in the state's business it may, and usually does, result in increased debt and higher taxes.

Writing in the North American Review in May 1910, President Woodrow Wilson had this to say of the short ballot: "The elective items on every voter's programme of duty have become too numerous to be dealt with separately and are, consequently, dealt with in the mass and by a new system, the system of political machinery against which we futilely cry out. * * * The short ballot is the short and open way by which we can return to representative government. It has turned out that the methods of organization which lead to efficiency in government are also the methods which give the people control."

And I think that the time has come for us to do something about the selection of judges in the several states.[6] A man

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6. Vol. 63 Reports of American Bar Association, 406, 435 et seq.

who would dare advocate popular election of University presidents or of school teachers would be laughed out of the state. Why? Because it is realized that the average citizen, honest though he may be, is not in position to pass upon the qualifications of an educator. I submit that the judge must deal with a learning infinitely more complicated than that which most school teachers know anything about. And to require the man who is to pass upon the rights of the people among whom he lives, who must punish the criminal and hold himself aloof from powerful influences seeking favor,—to require him, to whom the sacred scales of justice are intrusted, to go up and down his district seeking votes among the people whom he must judge, is to present a spectacle to make the angels weep. Be it said to the credit of American lawyers and judges that, even where this system obtains, the integrity of the judiciary has been sustained, often at great personal sacrifice, as where judges who have done their duty have been defeated at the polls; but there can be no doubt that the system has prevented many able lawyers from seeking service on the state bench and has in many instances given a political tinge to the administration of justice. As was well said by Judge Lummus in "The Trial Judge", the appointive system may make judges out of politicians, but the elective system makes politicians out of judges.[7] The judges in a democracy represent the people in the administration of justice, however they may be chosen; and the method of selection and tenure should be such that the judges when chosen will be absolutely free of the suspicion of political influence and that the ablest men in the legal profession will be willing to accept places upon the bench.

One evil has developed in connection with the representa-

7. The Trial Judge, p. 138

tive system that should challenge our most careful consideration. At the time of the adoption of the Constitution, one of the evils most greatly feared and guarded against was the tyranny of majorities. In recent years, there has arisen an even greater danger from the tyranny of organized minorities, which attempt to control the people's representatives in the interest of the classes which they represent. By organized pressure upon the people's representatives and threats of defeat at the polls, they seek to use the power of government in the interest of special groups instead of in the interest of the people as a whole; and to substitute government of favor and privilege for government based upon justice and right. How to deal with the problem presented is a troublesome one. It has been suggested that, instead of basing representation in the lawmaking bodies upon geographical divisions of the country, we give representation to the various economic interests, as is done in some of the states of Europe. This, however, seems to me to be wrong in theory; and I am sure it would prove mischievous in practice. The legislative representative should represent the people in their sovereign capacity, not the special interest of a group; and I am certain that to clothe representatives of groups with legislative power would degrade the legislative function into a mere matter of barter and compromise. The only remedy for the evil, I think, is for the people to frown upon it to the extent that their representatives will not dare listen to pleas of organized groups unless based upon reason and right. Men, of course, have a right to organize. They have a right to petition government. They have no right, however, to intimidate the people's representatives; and I confidently believe that the time is not far distant when they will no longer dare attempt it. We have learned how to deal with lobbyists seeking special favors for business. We shall have no difficulty in dealing with others

who seek special favors from government, once we put our minds to it.

3. THE FEDERAL SYSTEM.

A novel development of our system of popular sovereignty is the division of power between the federal government and the states which we call the federal system. Nothing like it, so far as my knowledge goes, ever existed in the world before; and nothing like it could exist in the absence of a genuine acceptance of the theory that sovereign power resides in the people and that government is a mere agency for the exercise of that power. The people have merely appointed two agents, the state governments to represent them in local affairs and the national government to represent them in national affairs. They stumbled upon it almost by accident, I think, largely as the result of their experience as colonists. The colonies were governed under charters granted by the mother country. Local government was carried on by local officers and assemblies; but the power of the Crown and Parliament was recognized as controlling in matters of general importance. During the Revolution the Continental Congress provided a kind of general government; and following this the Confederation of States provided a general government although a weak one. When, therefore, the Constitutional Convention met to form a more perfect union, the experience of dual government was ready at hand. To the states local governmental powers were intrusted; and to the central government, the powers necessary to the building of a nation.

The idea that the federal government was created by the states, rather than by the people of the entire country in their sovereign capacity was conclusively answered by Chief Justice Jay, who understood what was happening during the Revolution and at the time of the adoption of the Constitution

as well as any man in the country. His ability is attested by the fact that President Washington offered him his choice of positions in the new government. In Chisholm v. Georgia,[8] he said:

"In determining the sense in which Georgia is a sovereign state, it may be useful to turn our attention to the political situation we were in, prior to the revolution, and to the political rights which emerged from the revolution. All the country, now possessed by the United States, was then a part of the dominions appertaining to the crown of Great Britain. Every acre of land in this country was then held, mediately or immediately, by grants from that crown. All the people of this country were then subjects of the King of Great Britain, and owed allegiance to him; and all the civil authority then existing, or exercised here, flowed from the head of the British Empire. They were, in strict sense, fellow-subjects, and in a variety of respects, one people. When the revolution commenced, the patriots did not assert that only the same affinity and social connection subsisted between the people of the colonies, which subsisted between the people of Gaul, Britain and Spain, while Roman provinces, viz., only that affinity and social connection which result from the mere circumstance of being governed by the same prince; different ideas prevailed, and gave occasion to the Congress of 1774 and 1775."

After remarking that the Declaration of Independence found the people united for general purposes; that they continued to consider themselves one people from a national point of view, that they made the Confederation the basis of a general government, and that, disappointed with the Confederation, they had in their "collective and national capacity" established the present Constitution, he went on to say:

"It is remarkable, that in establishing it, the people exercised their own rights, and their own proper sovereignty,

8. 2 Dallas 419, 469.

and conscious of the plentitude of it, they declared with becoming dignity, 'We, the people of the United States, do ordain and establish this constitution.' Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a constitution by which it was their will, that the state governments should be bound, and to which the state constitutions should be made to conform. Every state constitution is a compact made by and between the citizens of a state, to govern themselves in a certain manner; and the constitution of the United States is likewise a compact made by the people of the United States, to govern themselves, as to general objects, in a certain manner."

The same idea was expressed by Madison in the Federalist [9] where he said:

"The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers, and designated for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether, in their reasonings on this subject, and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior, in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told, that the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents."

It is clear, I think, that the federal system in a large country such as ours is absolutely demanded by the principle of

9. No. XLV.

popular sovereignty. That principle requires that those who are affected by government control it; and this they can do in a large country with widely differing local interests only where local government is separated from the government of the nation. The federal system accomplishes this. The people of New York have nothing to do with the government of Virginia; and the people of Virginia have nothing to do with the internal affairs of the other states. All, however, have a voice in the national government to which all are subject and in the activities of which all are concerned.

One of the results of the federal system has been to solve one of the troublesome problems of history. It has often been observed that large nations are subject to a fatal weekness. Great power must be concentrated at the seat of government which results in crushing the liberty of the individual. It has been found also that it is practically impossible to make unified power operative for any great length of time over a wide expanse of territory among peoples of differing customs and ideals The result has been that the great empires of the past have flourished for a few years and have then fallen to pieces. The great state is necessary, however, to the building of a splendid civilization, for it is only in such states that the citizen can realize the widest opportunities of development. The citizen of England, for instance, enjoys cultural and commercial opportunities beyond comparison greater than those enjoyed by a citizen of one of the little Balkan states. The small state, on the other hand, is internally freer and stronger than the great state. Government is simple and generally well administered, for the reason that tyranny and incompetence are more easily detected and more readily dealt with in a local government than when they proceed from the distant seat of a great empire. The small state, however, is not only unable to furnish to its citizens the

opportunities which a great state furnishes, but also is unable to protect its liberties against the greed of powerful neighbors, as witness Austria, Poland, Czecho-Slovakia and Finland.

The federal system set up by our Constitution has combined the strength of the great and the small states and has, in large measure, eliminated the weaknesses of both. By providing for the control of local affairs by the several states, it has preserved the strength and freedom of local self-government. By delegating to the nation those governmental powers necessary to the preservation of harmony among the states, the regulation of life transcending state boundaries, and the dealing with foreign nations, it has created a nation of imperial size and grandeur. The United States, from the standpoint of resources, culture and opportunity afforded its citizens, as well as from the standpoint of national strength and power, is the equal of any nation that has ever existed on the face of the earth. This, however, thanks to the federal system, has not resulted in the sacrifice of local liberties. In matters of local government, which affect the life and happiness of the citizen much more intimately than matters with which the nation deals, its people comprise a group of comparatively small self-governing states as free as the Swiss cantons or the small Scandinavian countries.

There are other advantages of the federal system which are not generally appreciated. As Lord Bryce has pointed out, the states furnish laboratories, as it were, in which governmental experiments may be tried out without danger of national ruin if they fail. This furnishes opportunity for constant improvement of the governmental process. And in addition to this, the division of sovereign power among so many units of government, gives to government a stability which could be attained in no other way. If it were possible for revolutionists to seize the government at Washington, the

revolution would get nowhere, for the reason that the forty-eight states would still be operating on the republican principle and the people would have the machinery at hand to set up at once another national government under the Constitution. If they should seize New York City, the federal government would soon restore the government to the people; and this it would be in duty bound to do under the constitutional provision guaranteeing to every state a republican form of government and protection against invasion and domestic violence.[10] For this reason I have never been able to get excited over revolution in the United States. There is no sense in the people rising against themselves; and professional revolutionists from the outside would never be able to seize enough of the units of government operative under our federal system to make their power effective.

There is one danger in the federal system, however, to which I feel that we should direct our attention; and that is the danger of local demands upon the resources of the nation. The power of the federal government to tax and spend for the general welfare of the nation has been established;[11] and local interest and local pride, to say nothing of local greed, are always demanding that the federal government make expenditures in the several communities which the communities would never think of making for themselves. Even the conservative minded are whipped on by the cry that others are being helped by federal funds and their communities should have their share too. Good citizens who would not think of supporting a local tax for an elaborate public building will go to Washington and urge their Congressmen to have the federal government build it, on the general theory that its

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10. Constitution Art. IV, Sec. 4.
11. United States v Butler, 297 U. S. 1, 66.

building will not cost their community anything and will help local business. It is perfectly clear that, as the spending of national funds can be justified only by national policy, some way must be devised to put an end to this pressure by local communities upon the national treasury. I see no practical way except the cultivation of a national outlook on the part of the citizenship. And this way is not as hopeless as it may seem to some pessimistic souls. When the press and the leaders of thought in the various communities turn thumbs down on this sort of practice, it will cease. All that is needed is for the honest leaders of thought throughout the country to realize that honesty requires that national expenditures be made from considerations of national need, and not from considerations of local pride or advantage.

There is another thing that should be said with regard to the federal system. As life has changed, many matters which were formerly of purely local character and subject to the control of local governments have assumed national and even international significance. Not only has interstate commerce grown as a result of improved methods of transportation and communication, but many phases of production have become so inextricably intertwined with interstate commerce that it is simply idle to think of their being controlled by local governments. State anti-trust acts, for instance, are little more than a joke. Why? Simply because the trust, whether related to sale or production, operates in commerce which is interstate in character; and only the national government, which has control over interstate commerce, can furnish effective control. The prohibition of child labor would seem, at first glance, to be a matter of local concern; but experience has shown that such labor is ordinarily employed in production of articles which enter into interstate commerce and are sold on a national or world market, and that state regulation

operates unfairly as between producers located in different states and cannot be depended upon to eliminate the evil. The adoption of an adequate law by one state simply drives an industry which seeks to evade it into another state where laws are less stringent, with the result that the tendency is for the states having the most backward laws to set the standard for legislation in this vital matter. Regulation of agriculture would seem to be a local matter if you look only at the farmer working in his fields; but how futile regulation of agriculture by the states is seen to be when it is realized that the farmer must sell his product in interstate commerce and generally on a world market!

We might as well face reality. Adequate governmental regulation of our economic life is absolutely necessary, in my judgment, if we are to preserve our system of free enterprise from some form of collectivism. Laissez faire is gone, if, indeed, it was ever here. Unregulated economic life means that the little man is helpless in the grasp of those who are strong enough to direct economic forces; and free men will no more submit to economic tyranny than they will to political tyranny. Unless they can control economic forces so as to preserve justice in economic life, it is inevitable that they will listen to those who promise economic welfare through state ownership and operation of productive enterprise. Any adequate regulation of economic life means regulation by the national government, since those phases of economic life as to which there is greatest need of regulation are national in scope and influence. It is perfectly clear to my mind either that our concept of the power of the federal government under the commerce clause of the Constitution must be enlarged so as to embrace those phases of production which are so interwoven with interstate commerce as to have assumed national as distinguished from local significance, or else we

must amend the Constitution so as to vest control over these matters in the federal government. The time is past when we can afford to exempt economic life from any adequate regulation through mistaken application of the doctrine of states' rights.

Already the concept of powers under the commerce clause is being enlarged to meet the situation. In the celebrated Shreveport case [12] decided twenty-five years ago, it was held that the right of the state to regulate intrastate railroad rates might not be exercised in such way as to cast an undue burden on interstate commerce. In the second Coronado case,[13] a conspiracy affecting the mining of coal to be moved in interstate commerce was held violative of the Sherman Anti-Trust Act. In the Virginian Railway case [14] and the National Labor Board cases,[15] the power of Congress to enforce collective bargaining in industry wherein industrial conflict might affect interstate commerce has been upheld. In the case of Steward Machine Co. v. Davis,[16] the power of Congress to legislate in the interest of social security for workers in the several states has been sustained. And finally legislation directed towards the control of agricultural production was upheld in Mulford v. Smith.[17] By this course of judicial decision, the power of the federal government over the economic life of the nation is in process of being established without radical change in our institutions and even without amendment of the Constitution.

But let me add that I regard it of supreme importance that,

12. 234 U. S. 342.
13. 268 U S. 295.
14. 299 U. S. 525.
15. 301 U. S. 1.
16. 301 U S. 548.
17. 307 U. S. 38.

in this enlargement of the powers of the federal government, we preserve unimpaired the right of local self-government on the part of the states with respect to those matters which are properly local in character. Notwithstanding the necessity for control by the federal government of matters affecting the economic life of the nation, it still remains true that most matters in which government touches the life of the citizen are local and not national in character. The ownership and devolution of property, the preservation of peace and order, the punishment of crime, the control of family relationships —all of these are essentially local in character, and the maintenance of virile and efficient local government for their control is essential to the preservation of democracy And in this connection, I would point out that nothing will lead to undue centralization of power so quickly as decadence on the part of local governments. The first duty of government is to maintain peace and order and provide for the ordinary functioning of social life; and, when the local agency set up by the people fails in the discharge of this fundamental duty, the people will turn inevitably to the agency of the federal government. An unhealthy governmental condition must needs exist when the people must call upon the federal government to prosecute for income tax evasions criminals who should have been imprisoned or hanged by local governments for murder or robbery, or when the federal government must assert its power to punish election frauds or to prosecute under the postal laws men guilty of plundering the treasuries or institutions of the states. It is because the maintenance of efficient local government is so important to the working of the federal system that I have, in discussing the representative system, called attention to improvements needed in the legislative, executive and judicial departments of so many of the states. Advocates of states' rights quite generally fail

to realize that the duties of the states are commensurate with their rights; and advocates of centralization quite generally overlook the importance of the proper functioning of the states in the maintenance of the federal system. The matter was well put by President Wilson in his Constitutional Government [18] as follows:

> "It would be fatal to our political vitality really to strip the States of their powers and transfer them to the federal government. * * * It cannot be too often repeated that it has been the privilege of separate development secured to the several regions of the country by the Constitution, and not the privilege of separate development only, but also that other more fundamental privilege that lies back of it, the privilege of independent local opinion and individual conviction, which has given speed, facility, vigor, and certainty to the processes of our economic and political growth. To buy temporary ease and convenience for the performance of a few great tasks of the hour at the expense of that would be to pay too great a price and to cheat all generations for the sake of one."

From time to time, the idea has been advanced that the federal system as embodied in our government points the way of peace to the nations of Europe. The suggestion has recently been renewed, and it seems to me to furnish much food for thought. Mere leagues of independent nations can never secure peace, principally because they lack the power to make their decisions effective. Only a government possessing the power of the purse and of the sword will be able to protect its constituent peoples from foreign aggression and preserve the peace among them. Such a government with limited powers and with constitutent states retaining the rights of local government as do the states of our American Union, furnishes a plan upon which the smaller states of Europe

18. 1908 Ed., pp 170-2, 191-2

might be able to unite in a way that would do much to solve the problems which constantly threaten war. It is too much to hope, I think, that the larger nations of Europe would be able to get together on such an arrangement within any reasonable time in the future; but the union of the smaller nations into federal states of this character would do much toward preserving the peace of the world.

4. THE SEPARATION OF POWERS.

The necessary delegation of sovereign power to governmental agencies is fraught with danger to popular liberty. These agencies are clothed with all the power of the state—the army, the navy, the civil organization. The danger is that they will repudiate their responsibility to the people and use the power in their hands to bring the people into subjection. The history of the world is replete with instances where just this has happened; and to guard against its happening here was the chief concern of the framers of our government. The device which they adopted to preserve the liberties of the people, against usurpation of power by their agents, was the division of powers among the three great branches of government and a system of checks and balances, under which it is impossible for any department of government to exercise even the portion of sovereignty committed to it without the cooperation of another department.

More than two thousand years ago Aristotle saw that the powers of government are threefold: the power of making laws or deliberating about public affairs, the power of enforcing laws and the power of judging.[19] John Locke made approximately the same classification. But it remained for

19. The Politics, Jowetts Translation IV, XIV, p. 133; Coker Francis William, "Readings in Political Philosophy", 89-90.

Montesquieu to demonstrate that these powers should be exercised by different agencies and that the preservation of popular liberty depended upon their separation. He says:[20]

> "When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions might arise lest the *same* monarch or senate should *enact* tyrannical laws, to execute them in a tyrannical manner." Again, "There is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the *Judge* would then be the legislator. Were it joined to the executive power, the judge might behave with the violence of an oppressor. There would be an end of everything were the same man or the same body, whether of nobles or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and that of trying the causes of individuals."

Sir William Blackstone follows Montesquieu in this thought. In his commentaries on the Laws of England he says:[21]

> "Whenever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty. The magistrate may enact tyrannical laws and execute them in a tyrannical manner, since he is possessed, in his quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself."

And as to the necessity for the separation of the Judicial from the legislative and executive power, he says:[22]

> "Were it joined with the legislative, the life, liberty, and

20. Spirit of Laws, Book XI, ch. VI.
21. Commentaries, vol 1, p. 146.
22. Commentaries, 169.

property of the subject would be in the hands of arbitrary judges whose decisions would be regulated only by their opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance of the legislative."

This separation of powers was accepted as axiomatic by the founders of our government. It first found expression in the Constitution of Virginia adopted in 1776, which provided "that the legislative, executive and judiciary departments shall be separate and distinct; so that neither exercises the powers properly belonging to the other". Similar provisions were contained in the Constitutions of Georgia, Maryland, Massachusetts, New Hampshire and North Carolina.[23] The Constitution of Massachusetts of 1780 not only required the division but gave the reason for it: "to the end that it may be a government of laws and not of men".[24] The constitutions of all except eight of the other states expressly require the separation.[25] The federal constitution makes the separation without requiring it in express words, that is to say all legislative power is given to Congress, all executive power to the President and all judicial power to the courts.

There can be no question as to the importance attached to the principle by the founders of the government. President Washington warned with regard to it in his farewell address, saying: "The spirit of encroachment tends to consolidate the powers of all departments in one, and thus to create, whatever the form of government, a real despotism." Madison in

23. Federalist No 46

24. Poore's Federal and State Constitutions

25. Bondy, William, "Separation of Governmental Powers," Columbia University Studies in History, Economics and Public Law, 1896, pp. 17-21

arguing for the adoption of the Constitution and answering the objection that the Constitution did not preserve the separation of powers, said:[28] "The accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, a few, or many, whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Jefferson in his "Notes on the State of Virginia," quoted in Federalist No. 46, says. "The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one."

But the framers of our government provided not merely for the division of the sovereign power of governing among the agents of the people, so that no one of them would ever have in his hands the full power of sovereignty; but also that none of these agents could exercise even the portion of sovereignty delegated to him without the assistance and cooperation of another agency. The great power of lawmaking was intrusted to Congress, but Congress was divided into two houses and laws were to become valid only when passed by both houses. In addition to this, the approval of the President was provided for; and in case of his veto, laws could be passed only by a two-thirds vote of both houses. Appointment of officers, executive and judicial, was granted to the President, but, except in cases of certain minor officers, appointments were to be effective only when confirmed by the Senate. The judges were clothed with judicial power but were made dependent upon the legislature for the payment of their salaries and the equipment of their courts and upon the executive for the enforcement of their decrees.

28. Federalist No. 46.

It will be remembered that one of the objections most seriously urged against the Constitution was that this system of checks and balances was in violation of the theory of the separation of powers. One of the most valuable contributions of Madison to the great debate over its adoption was to show that the system was not violative of the theory of separation, but was necessary to secure each of the departments from encroachments by the others. In the opening paragraph of Federalist No. 47, he says: "It was shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake in the next place to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." In Federalist No. 50, Hamilton says: "But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."

The importance of the division of powers and of the system of checks and balances provided by the Constitution is as great today as it was when the government was founded. The expansion of governmental power resulting from the complexity of economic life has made the danger of usurpation by agents of the people not less but greater than it was in a simpler age. We have but to look at what has happened in the totalitarian states of Europe and in our neighbors of South and Central America to see how easy it is, under the guise of economic necessity, for a dictatorship to be established by those intrusted with power. It is true, however,

that the necessity for the regulation of economic life requires certain modifications of the machinery upon which we have relied to secure the separation of powers and to prevent encroachment by one department of government upon the domain of other departments.

One of the outstanding developments of recent years has been the growth in the executive department of administrative agencies combining with their executive functions powers which are essentially legislative or judicial in character The Interstate Commerce Commission, the Federal Trade Commission, the National Labor Relations Board, the Board of Tax Appeals are illustrations of what I have in mind The importance of the development is manifested by the fact that there are more than one hundred and fifty such administrative agencies and tribunals in the federal government alone Some have been created to exercise quasi legislative functions, because it is a matter of impossibility for a great deliberative body like Congress to legislate with respect to the details of governmental regulation of industry. It would be out of the question, for instance, for Congress to legislate with respect to each of the hundreds of thousands of rates fixed by the Interstate Commerce Commission. Others have been created to exercise quasi judicial functions with respect to the regulation of industry, because the courts are not equipped to deal with the sort of questions involved. The suppression of unfair competition by the Federal Trade Commission, for example, or the supervision of collective bargaining by the Labor Board involve essentially the supervision of administrative details rather than the settlement of conflicting rights; and the courts have no machinery for dealing with them adequately. The result of the growth of these administrative tribunals has been the development of a great body of administrative law in this country, a matter which at first

caused alarm to many, but which is now recognized in most quarters as logical and salutary [27]

To my mind it is utterly futile to inveigh against the growth of these tribunals. If government is to exercise the control over economic life essential to the preservation of free enterprise, some such form of administrative agency is absolutely necessary to the proper and efficient exercise of governmental power. The problem is, not to prevent their growth, but to preserve in their processes the fundamental principles of freedom which have come down to us from the fathers.[28] In these processes, some mingling of legislative or judicial functions with executive functions is frequently necessary; but we must see to it that, not only the spirit of justice and fair play, but also the ultimate separation of these powers, is preserved, so that no single agency of the people may have opportunity to arrogate sovereign power to itself. This means, in brief, that the legislature must not be permitted, under guise of delegating administrative functions, to abdicate its essential legislative or policy making function to the executive, and that, for those whose rights are affected by administrative action, the right of judicial review by an independent judiciary must be preserved inviolate.

5 POPULAR SOVEREIGNTY.

I have sketched the democratic concept of sovereignty as embodied in the American government. I have endeavored

27. Harlan Fiske Stone, "The Common Law in the United States", address delivered at the Harvard Conference on the Future of the Common Law, 50 Harvard Law Review 1.

28. Report of Special Committee on Administrative Law, 64 A. B A Reports 575 et seq.; 63 A B. A. Reports 331 et seq ; Report of Committee on Administrative Agencies and Tribunals of Section of Judicial Administration, 64 A B. A. Reports 407.

to point out that the representative system is essential to efficient exercise of sovereignty by the people; that the federal system is necessary if we are to preserve the freedom of communities and the benefit of local self-government in the building of the nation; and that, in a representative government, division of powers with a system of checks and balances is necessary to prevent the arrogation of sovereign power to themselves by the people's representatives.

So long as sovereign power is exercised in accordance with these principles, I see no reason why popular sovereignty is not the answer to the quest for good government. Recently there have arisen those who tell us that democracy is a failure; that the people haven't sense enough to govern themselves; and that to secure efficiency they should make an assignment in bankruptcy, as it were, to some despot to handle the business of governing for them. This is the argument of Nazis and Fascists reduced to its real meaning; and the argument of the Communists comes to the same thing; i e, pending the happy day when all government will become unnecessary, the people are to surrender all power into the hands of self-appointed leaders. Even if the efficiency argument were sound, which I deny, it would furnish no ground for the surrender of popular sovereignty. If history proves anything, it proves that those to whom sovereign power is surrendered will ultimately use it for their own advantage and for the benefit of their families and friends, and not for the good of the people as a whole.

But the efficiency argument is not sound. As Mr. Jefferson said, the people will attend to their own business better than anybody else will attend to it for them. They make mistakes, it is true, but their mistakes are not to be compared with the mistakes of autocracies. They frequently select inefficient representatives; but the inefficiency of these is not to be com-

pared with the inefficiency and corruption which invariably characterize the bureaucracy of a despotism. A democracy rests upon virtue and love of country, a despotism rests upon fear; and it follows as the night the day that government based upon virtue, which ennobles, will be better and more efficient than government based upon fear, which degrades. The world has seen no better government than that of the United States or of England during the period that the people themselves have ruled these great countries. It has become fashionable with defenders of democracy to say: "Of course democracy is inefficient, but it is preferable even with its inefficiency to other forms of government". This admission of inefficiency is nonsense. Of course democracy is inefficient when compared with the ideal; but history demonstrates beyond peradventure that, judged by any criterion that may be chosen, the democracies have provided better government and more efficient government than the despotisms.

The great need of the hour is that we renew our faith in the people as the source of sovereign power—our faith in their inherent honesty, their ultimate wisdom, their patriotism, their capacity for self-control and self-sacrifice. Government must rest finally upon reason; and no better source of reason can be found than in the minds and wills of the governed. "Government of the people, for the people and by the people" is still the highest ideal for the exercise of sovereignty that can be attained.

THIRD LECTURE.

III. Government by Law.

1. The Nature of Law.

Professor McIlwain of Harvard recently began an article in Foreign Affairs, republished in his "Constitutionalism and the Changing World", with this arresting statement,[1] the truth of which becomes obvious upon the least consideration:

> "The one great issue that overshadows all others in the distracted world today is the issue between constitutionalism and arbitrary government. The most fundamental difference is not between monarchy and democracy, nor even between capitalism and socialism or communism, tremendous as these differences are. For even in any socialistic or communistic regime, as now in every bourgeois democracy, there will be rights to be preserved and protected. Deeper than the problem whether we shall have a capitalistic system or some other enshrined in our law lies the question whether we shall be ruled by law at all, or only by arbitrary will."

Why government by law should be thus challenged, presents an interesting inquiry. It is a far cry from the enlightened concept of Grotius or the liberal democracy of the founders of the American government to the arbitrary application of the force of society exemplified in the totalitarian state. The personal ambition of dictators furnishes, of course, no adequate explanation. That is but a surface symptom of a deep seated disease. The real explanation, I think, is to be found in the growth of materialistic thought, which lies at the basis of Fascism and Naziism as well as of Communism. Dazzled by the achievements of science in the

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1. "Constitutionalism and the Changing World", p. 266

realm of the physical, men have been losing their hold upon spiritual values. They have forgotten that man lives, not by bread, but by truth, that right eventually makes might but that might can never make right.

Nowhere has the false philosophy of materialism been more destructive than in the realm of law. Here it has become quite the fashion of late to deride the great legal concepts of the past as outmoded. The reality of such a thing as a legal principle is denied, and no importance is attached even to a decision of the courts except in so far as it embodies the exercise of power by the state. This means that law becomes a matter of brute force and arbitrary will; and it is upon this concept of law that the totalitarian state is founded. There is, of course, nothing new about the philosophy. It is as old as the history of human error. There is a story in the book of Genesis about a foolish people who imagined that they could build a tower that would reach to heaven; and the same childlike faith is shown by those who think that happiness can be reached in the realm of the physical.

The concept of democracy gives reality to law. Under that concept, law is not something external or accidental but internal and organic. It is not the product of force, but of reason. It is not imposed upon a people by the arbitrary will of a lawgiver, but arises out of life and determines how life is to function. And this concept of law is not only inherent in but is also essential to democracy. As we have seen, democracy in government means the recognition of the individual in the life of the state; and only through law can this recognition be attained. Only through law can the individual be protected from the crushing power of the state; and only through law is it possible for the people themselves to exercise sovereignty.

The trouble in thinking about law arises from the failure

to distinguish between law on the one hand and the enforcement of law by the authority of the state on the other. Law in its most general sense is defined by Professor Henry Horace Williams as "unity in action-difference",[2] i. e., it is the unity of nature as manifested amid change of circumstance. There is something in the nature of matter that causes it to act in certain ways; and these ways of action we call the laws of physics. There is something, too, in the nature of human society that determines how society should act and how the members of society should act towards society and towards each other. This is the law that we are dealing with, the life principle of society. It must be interpreted in terms of rules, and these rules must be enforced by the power of the state; but the source of the law is not the power which enforces the rules, but the life of the state itself, and the source of the rules is not that power, but reason applied to the life of the state.

This is not something which I have just now discovered. It is something that all the great lawyers of history have been saying to us through the ages. "Law" says Cicero, "arises out of the nature of things". He thus defines it:[2(a)]

> "There is in fact a true law—namely, right reason—which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is

2. "The Evolution of Logic", p. 139.

2(a). Cicero Republic III, 22, Trans. by Sabine and Smith. Quoted "A History of Political Theory", George H. Sabine, p. 164.

impossible. Neither the senate nor the people can absolve us from our obligation to obey this law, and it requires no Sextus Aelius to expound and interpret it."

St. Thomas Aquinas and John Locke taught that the justification for human regulation, and the coercion by which it is made effective, lie in the nature of human beings, and that power merely gives force to that which is reasonable and right [3] Grotius taught that certain broad principles of justice are natural—that is universal and unchangeable—and that upon these principles are created the varying systems of municipal law. He gave this definition of natural law: [4]

"The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God."

Rousseau saw the analogy of the state to a living organism and of law to its life principle and summed up his concept of law in the following words: [5]

"The body politic, therefore, is also a moral being possessed of a will; and this general will, which tends always to the preservation and welfare of the whole and of every part, and is the source of the laws, constitutes for all the members of the state, in their relations to one another and to it, the rule of what is just or unjust."

Dean Pound, in his recent lectures before the law school of Tulane University,[6] points out that the believers in eight-

3. "A History of Political Theory", Sabine, 255.
4. Quoted by Sabine in "A History of Political Theory," p. 424.
5. Quoted by Sabine p. 585.
6. "The Formative Era of American Law", Pound, pp. 15-16.

eenth century natural law did great things in the development of American jurisprudence "because that theory gave faith that they could do them". He thus describes the concept of law held by them:

> "This natural law was variously conceived: sometimes as a vaguely outlined ideal order of society, sometimes as a body of moral ideals to which conduct should be constrained to conform, sometimes as a body of ideal legal precepts by which the precepts of positive law are to be criticized and to which, so far as possible, they are to be made to conform. But whatever meaning was given to the ideal or body of ideals, the interpretation and application of existing rules were to be guided by it, and lawmaking, judicial reasoning, and doctrinal writing were to be governed by it."

And with respect to the need of some such concept in the modern world and in advocacy of a revised natural law, this great legal scholar has the following to say:[7]

> "Today the rule of the ideal element in law and the need of a canon of values and technique of applying it are recognized by all except those who still cling to nineteenth-century analytical jurisprudence and take it to be the whole of the science of law, and those skeptical realists who take the judicial and administrative processes, determined by individual psychology, as all that is significant. Natural law, as it is revived today, seeks to organize the ideal element in law, to furnish a critique of old received ideals and give a basis for formulating new ones, and to yield a reasoned canon of values and a technique of applying it. I should prefer to call it philosophical jurisprudence. But one can well sympathize with those who would salvage the good will of the old name as an asset of the science of law."

It is this natural law, inherent in the social organism, which is meant when we speak of government by law as distin-

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7. Id. pp. 28-29.

guished from government by arbitrary will. One reason that we are in danger of losing government by law is that we have paid too much attention to the "skeptical realists", who see no significance in anything except "judicial and administrative processes, determined by individual psychology". They were appropriately answered a century and a half ago by Edmund Burke. "Is that the law of the land", said he, "upon which, if a man go to Westminster Hall, and ask counsel by what title or tenure he holds his privilege or estate, according to the law of the land, he should be told that the law of the land is not yet known; that no decision or decree has been made in his case; that when a decree shall be passed, he will then know what the law of the land is? Will this be said to be the law of the land, by any lawyer who has a rag of a gown left upon his back, or a wig with one tie upon his head," [8]

There were errors in the old theory of natural law, but the basis of the concept, which is essentially the same as our concept of the "common law", was fundamentally sound. It is not possible, of course, to deduce a system of law from abstract reasoning about human rights. On the other hand one is not realistic who does not see the organic nature of society and the necessary relationships existing among its members. And to ignore the fact that these necessary relationships form the basis of the laws by which society lives and that the rules of law are deduced by applying reason to these relationships, is to close one's eyes to the most obvious fact with which the lawyer must deal Faith in the reality of this natural law, faith in man's ability to understand and interpret it, and faith in his ability to perfect the rules of law enforced

8. Quoted by Webster in Dartmouth College v. Woodward, 4 Wheat. at 582.

by the state through study of the ideal system which natural law envisages, is the need of the world today if we are to be ruled by law and not by arbitrary will.

2. THE INTERPRETATION OF LAW.

The interpretation of this natural law of society in terms of rules and standards enforced by the power of the state is the essence of government by law. This interpretation is made in part by the legislature, either in the form of declaratory statutes, which merely formulate rules already existing, or in the form of remedial statutes which change the rules in a process of conscious social evolution. The larger part, however, is made by the courts in applying through judicial decisions the principles of the law, inherent in the social organism, to controversies before them. Cases are constantly arising which no statute covers. The duty of the judiciary, and probably its most important duty, is to declare the law applicable to these cases. The judge does not make law in this process; for his decision is invoked as to cases which have already arisen and are governed by existing law. In declaring the applicable law, he states the rule dictated by reason when the principles of the "natural" or common law are applied to the relationships out of which the case has arisen. Prior decisions are not the law, but merely evidences of it, and they may be overruled or disregarded if found out of harmony with the present state of social organization. Thus the rule of the old decisions was that a man might whip his wife so long as he used a switch "no larger than his thumb". This rule was asserted as a defense in State v. Oliver[9] where defendant was charged with a battery upon the person of his wife. No statute had been passed modifying

9. 70 N. C. 60.

the old rule, but the court rejected it as a defense, saying: "The courts have advanced from that barbarism."

In a case which came before our court, Funk v. United States,[10] we felt constrained by prior Supreme Court decisions to hold that the wife of a defendant was not a competent witness in his behalf. The decision was reversed by the Supreme Court, although there had been no statute changing the common law rule applied in its prior decisions which we had followed. In doing this the court, speaking through Mr. Justice Sutherland, said:[11] "The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule." And, after quoting from Hurtado v. California[12] that "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law", went on to say: "to concede this capacity for growth and change in the common law by drawing 'its inspiration from every fountain of justice,' and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a 'flexibility and capacity for growth and adaptation' which was 'the

10. 4 Cir. 66 F. 2d 417.
11. 290 U. S. 371, 381.
12. 110 U. S 516.

peculiar boast and excellence' of the system in the place of its origin." It is clear that the "common law" which the learned justice had in mind in this quotation and the "common law" as understood by most lawyers is, not merely the body of decided cases, or even the settled custom of the people, but the concept of natural law which we have been discussing.

But although decisions of the courts do not make law, they are highly persuasive evidence of what the law is; and the rule is well settled that they are to be followed unless clearly wrong. This is the rule of stare decisis. The courts have not hesitated, however, to ignore this rule when, in their opinion, a decision is clearly shown to be erroneous in the light of better understanding, or when there has been such a change of conditions as to render it no longer in harmony with the life of the state. The recent expression of Mr. Justice Frankfurther in Helvering v. Hallock[13] states the rule as it is accepted by the present Supreme Court. Said he:

> "We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

To this he added later in his opinion, "This court, unlike the House of Lords, has from the beginning rejected a doctrine of disability at self-correction".

In harmony with this view is that expressed by Mr. Justice

13. 309 U. S. 106, 119, 60 S. Ct. Rep. 444, 451.

Stone before the Harvard Conference on The Future of the Common Law,[14] where he said:

> "In its highest generalization the historic ideal of the common law is a reasoned application of authoritative standards of conduct for all actions, public and private. The common-law ideal of a universal law above the agencies of government never took form in a government held down at every turn by meticulous rules analogous to the rules of real property. * * *
>
> "Whatever tendencies were exhibited in the last century toward an effort to reduce all law to such a system of rigid rules, it has at length been made plain that public law, where constitutions themselves do not impose explicit restraints, is not an aggregate of hard and fast precepts to be handed on and followed from generation to generation. It is rather an indication of starting points for legal reasoning and of a technique for developing it, expressing the ideal of a reasonable exercise of the powers of politically organized society, than the subjection of government to inexorable commands imposed upon it in another age. In such a system there is need of continuity such as the not too rigid adherence to precedent may attain, but it is the continuity not of rules but of aims and ideals which will enable government, in 'all the various crises of human affairs', to continue to function and to perform its appointed task within the bounds of reason." 'eness."

The recent case of Erie R. R. v. Tompkins,[15] is not in conflict with this thought, although certain passages of the opinion lend support arguendo to the theory of the so-called legal realists that the "law is what the judge says it is." That case merely holds that the rules of law, as established by the decisions of a state court, must be applied by the federal courts in cases where the law of that state is applicable. As

14. 50 Harvard Law Review 1, 23-24
15. 304 U S. 64.

pointed out in the case of Ruhlin v. New York Life Ins. Co.,[16] this is precisely what was done theretofore in cases involving what was known as "local" law. In other words, the federal courts must "search for and apply" the substantive law of the state in cases to which the state law is applicable, whether embodied in a statute or not; and, under the stare decisis doctrine, the decisions of the state are to be followed by the federal courts as the best evidence of what the law of the state is. There is much to be said for the view that the federal courts are as well qualified as are the state courts to determine what the law of the state is, and that it is unreasonable to require them to follow a state decision which the state courts themselves are at liberty to overrule. And there is force, also, in the argument that the exercise of an independent judgment by the federal courts, subject to review by the Supreme Court of the United States, is in the interest of orderly legal development and prevents the sort of injustice likely to arise from interpretation of law by courts with a provincial outlook. But, on the other hand, it is certainly incongruous that there should be disagreement between the federal courts and the courts of the state as to what the law of the state is; and where the state courts by course of decision have clearly established a rule of law for the state, it is not unreasonable that the federal courts should apply it as the law of the state just as they do state decisions relating to property rights. This does not mean, however, that, in the absence of a clear decision by the state courts, the federal courts must speculate as to what the state courts might decide if the case were before them, or that they must follow an isolated state decision which is so clearly out of line with other decisions of the state as not to be fairly indicative of what the

16. 304 U. S. 202.

state law is, or so antiquated as to be out of harmony with the state's life. The federal courts must apply the substantive law of the state; they must accept the decisions of the state courts under the rule of stare decisis as establishing that law; but it is still their duty to exercise the judicial function, i.e., to interpret and apply the law of the state judicially, remembering that decisions are mere evidences of the law and not the law itself.

The fallacy that "the law is what the judge says it is" might be dismissed with a smile, were it not for the fact that it gets so many lawyers into trouble in their thinking. If the law is what the judge says it is, is there no law until he speaks? And how does he decide a case where there is no decision to guide him, as is frequently the case? And what happens when a court of last resort reverses a lower court, or overrules a prior decision of its own? If the law is what the judge says it is, then courts, at least appellate courts, never make mistakes as to the law, for the decision establishes the law. Prior decisions could never be overruled; for the overruling decision would not be the correction of a mistake but a change in the law, an act of legislation beyond the power of the court. I am told that not more than ten per cent of the adjudicated points of law have been passed on by the courts of my state, but it would be absurd to say that there is no law in North Carolina with respect to the matters that its court has not been called on to decide. This is precisely the fallacy so picturesquely ridiculed by Burke. Equally fallacious are those who attempt to define law in terms of prophecy, i.e., that the law is that which it can be predicted the court will decide. If those who give this definition were merely attempting to be cynical or witty, it might be passed without comment; but they believe it. When their "legal realism" is confronted with the fact that there are innumerable rules of

law applied by the people in their daily life and by lawyers in advising their clients, upon which there are no court decisions, they take refuge in this confusion of law and prophecy. Be not deceived by them. The lawyer's business is analysis and interpretation, not prophecy. He should be a guide who knows, not a soothsayer who guesses.

To sum up on this branch of the subject: Democracy envisages government by law. Government by law means, not government under rules imposed upon a people by force, but government in accordance with that natural law which is the life principle of their society. This natural law must be interpreted in terms of rules and standards to be enforced by the state; and such interpretation is made in part by constitutions and statutes and in part by decisions of the courts Constitutions and statutes must themselves be interpreted and applied by the courts in the light of the legal system which gave birth to them; but in the greater number of cases there is no statute and the courts must decide in accordance with the principles of natural justice arising out of the relationships involved. In this process, a great body of rules and legal principles evidenced by legal decisions is gradually built up; but the wise lawyer should never forget that these are but evidences of the law that he is applying, the law which "arises out of the nature of things", whose voice is the voice of reason and whose force is the force of inherent necessity.

3. THE JUDICIARY UNDER OUR CONSTITUTION.

What I have said above describes the proper function of the judiciary wherever any real judicial system exists. With us, however, the exercise of the function is complicated by the fact that the basic principles of the law relating to the exercise of sovereignty are embodied in a written constitution which the courts must interpret and enforce as fundamental

law. The courts must thus stand between the individual and the government, between the nation and the states and between the different departments or branches of the government itself and declare the rights and powers of each in the light of this fundamental law. Without this exercise of power on their part, our constitutional system simply would not be workable

The importance of this in the preservation of the liberty of the individual cannot be overestimated. The judiciary is the only branch of government which he can require to act for the preservation of his rights He may petition Congress or the executive, but his petition may be disregarded. When he files a suit in court, however, the court must act. Milligan is sentenced to death by a court martial pursuant to act of Congress, without the jury trial which the Constitution guarantees He sues out a writ of habeas corpus.[17] The court is presented with no abstract question. It must either release him by declaring unconstitutional the act of Congress denying jury trial, or it must let him die and thereby nullify the constitutional guaranty which he invokes. Without the exercise of such power on the part of the courts, guaranties of rights to the individual against the power of government would amount to nothing.

The same is true as to maintaining the federal system and the separation of powers between the three branches of government. If the courts were without power to declare acts of state legislatures unconstitutional, state laws interfering with interstate commerce or penalizing nonresidents doing business in the states would soon destroy the Union. If they were without power to declare acts of Congress unconstitutional, that body would have the power to destroy the states

17. Ex parte Milligan, 4 Wall. 2

absolutely, to perpetuate its members in power and to arrogate to itself the powers granted by the people to the executive and the judiciary.

Every now and then some one revives the old argument that the limitations of the Constitution were intended to be binding upon the consciences of legislators but to have no binding force as law to be enforced by the courts. This arises from confusion of thought as to the nature of the government. As I have endeavored to point out, sovereign power resides in the people. Legislators are but agents to whom is delegated the exercise of governmental power. The Constitution marks the limits of that power; and acts beyond the limits of the power granted must necessarily be void. Otherwise, the creature becomes greater than the creator and sovereign power is vested in the legislature instead of in the people. This was made clear long ago by the greatest judge who ever sat on any court at any time in the world's history. It should be a work of supererogation to quote to this audience from Marbury v. Madison.[18] My excuse for doing so is that what may be termed the great heresy of American constitutional law is there so mercilessly exposed that the wonder is that any one should be found to support it. Chief Justice Marshall said in that case:

> "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental; and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

18. 1 Cranch 137, 176-178.

"This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act.

"Between these alternatives, there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the constitution, is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

* * *

"It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the

very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."

The statement sometimes heard that this doctrine represents judicial usurpation on the part of the great Chief Justice is sufficiently answered, I think, by what I have quoted. It is worthy of note, however, that the same doctrine was laid down in 1798 in Calder v. Bull,[19] by Mr. Justice Iredell, who died before Chief Justice Marshall was appointed to the bench. That great North Carolinian had this to say on the subject:

"If, then, a government, composed of legislative, executive and judicial departments, were established, by a constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void. * * *

"In order, therefore, to guard against so great an evil, it has been the policy of all the American states, which have, individually, framed their state constitutions, since the revolution, and of the people of the United States, when they framed the federal constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case."

And in a letter to Richard Dobbs Speight on August 26,

19. 3 Dallas 386, 398.

1787, regarding the decision in Bayard v. Singleton,[20] Judge Iredell had this to say on the same subject.[21] His remarks relate, of course, to the State Constitution; but they deal with judicial review of acts of the legislature and enunciate the same views as expressed by him later in Calder v. Bull. He said:

"I confess it has ever been my opinion, that an act inconsistent with the Constitution was void; and that the Judges, consistently with their duties, could not carry it into effect. The Constitution appears to me to be a fundamental law, limiting the powers of the Legislature, and with which every exercise of those powers must, necessarily, be compared. * * * The Constitution, therefore, being a fundamental law, and a law in writing of the solemn nature I have mentioned (which is the light in which it strikes me), the judicial power, in the exercise of their authority, must take notice of it as the groundwork of that as well as of all other authority; and as no article of the Constitution can be repealed by a Legislature, which derives its whole power from it, it follows either that the fundamental unrepealable law must be obeyed, by the rejection of an act unwarranted by and inconsistent with it, or you must obey an act founded on an authority not given by the people, and to which, therefore, the people owe no obedience. It is not that the judges are appointed arbiters, and to determine as it were upon any application, whether the Assembly have or have not violated the Constitution; but when an act is necessarily brought in judgment before them, they must, unavoidably, determine one way or another. * * *

"In any other light than as I have stated it, the greater part of the provisions of the Constitution would appear to me to be ridiculous, since in my opinion nothing could be more so than for the representatives of a people solemnly assembled to form a Constitution, to set down a number of

20. 1 N. C 5, 1 Mart. 48.
21. McRee's Life of Iredell, vol 2, pp 172, 175.

political dogmas, which might or might not be regarded; whereas it must have been intended, as I conceive, that it should be a system of authority, not depending on the casual whim or accidental ideas of a majority either in or out of doors for the time being; but to remain in force until by a similar appointment of deputies specially appointed for the same important purpose; and alterations should be with equal solemnity and deliberation made. And this, I apprehend, must be the necessary consequence, since surely equal authority is required to repeal as to enact."

And Judge Iredell was proclaiming no new or strange doctrine. The power and duty of the judiciary to declare legislative acts unconstitutional was upheld wherever the question was raised; and it was raised in four states prior to the adoption of the federal Constitution, Virginia, New Jersey, Rhode Island and North Carolina. Cases in which the power was upheld were Holmes v. Walton,[22] decided in New Jersey in 1779; Com. v. Caton [23] and the Case of the Judges [24] decided in Virginia in 1782 and 1788 respectively; Trevett v. Weedon [25] decided in Rhode Island in 1786, and Bayard v. Singleton [26] just referred to, decided in North Carolina in 1787.

The idea that the doctrine represents a usurpation of power on the part of Marshall becomes absolutely absurd when it is remembered that it was put forth by Hamilton in Federalist No. 78 as a reason for adopting the Constitution. This argu-

22. Papers American Historical Society, vol. II, p. 46, referred to in State v Parkhurst, 4 Halstead 427, 444 and Taylor v Reading, 4 Halstead 440.

23. 4 Call. 1.

24. 4 Call. 139.

25. Arnold, History of Rhode Island, vol. II, ch. 24; Cooley's Const. Lim. 7th ed. 229; 10 Records of Rhode Island (1865) 219.

26. 1 N. C 5, 1 Mart. 48.

ment of Hamilton, which seems to have been overlooked by certain scholars, is as follows:

"Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts must be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

"There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs

to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred to the statute, the intention of the people to the intention of their agents.

"Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental."

It is true, of course, that in the exercise of this power, the courts should proceed with great caution and accord due respect to coordinate branches of the government. They are given no power to legislate or to substitute their views as to what is wise and expedient for the views of the legislature. Where possible to do so, the act of the legislature should be given an interpretation consonant with its constitutional validity; and only in those cases where this cannot be done and where conflict with the Constitution appears beyond all reasonable doubt should the act be held void. Even then, the court should not declare the statute void, if the case can be properly decided on some other ground. In brief, the courts should not pass upon the constitutionality of legislation unless the question must necessarily be decided for the proper disposition of a case before them; the statute should then be interpreted so as to conform to constitutional provisions if possible; and it should not be held void for conflict with constitutional provisions unless the conflict appears beyond all reasonable doubt.

There is another principle of constitutional interpretation

which the courts must apply in deciding upon the validity of legislation: The Constitution is to be interpreted as a charter of government, not as a contract; and its meaning is to be ascertained, not merely by inquiring what was in the minds of its framers, but by considering the principles which it embodies in the light of the history of the nation and the needs of the social organism. The thought was well expressed by Chief Justice Hughes in Home Building & Loan Association v Blaisdell,[27] where he said:

> "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is *a constitution* we are expounding' (McCulloch v. Maryland, 4 Wheat. 316, 407)—'a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs'. Id., p. 415. When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, 252 U. S. 416, 433, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. * * * The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'"

Mr. Justice Sutherland, who dissented from the decision just cited, gave his approval to the principle of constitutional

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27. 290 U. S. 398, 442

interpretation here under consideration in the case of City of Euclid v. Ambler,[28] where he said:

> "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation In a changing world, it is impossible that it should be otherwise."

The Constitution is the formulation and expression of the legal principles under which sovereignty is exercised. They must be interpreted and applied to changing conditions, and one of the highest functions of the judiciary is to so interpret and apply them; but this does not mean that the Constitution is what the judges say it is. Judicial decisions are mere applications of the principles embodied in the Constitution, and are evidence of what they are and what they mean, but no more. A bridge built according to the principles of geometry is not itself geometry. An erroneous decision interpreting the Constitution does not amend the Constitution nor does a decision overruling a prior decision amend it. The truth is that, because the expression of legal principles in the written Constitution gives them a force that they would not otherwise have, the rule of stare decisis is given less weight with

28. 272 U S. 365, 387.

respect to the decisions applying them than it has in ordinary cases.[29]

One school of thought, while admitting the necessity of judicial review in cases involving specific provisions of the Constitution, would limit it to those cases, and deny it in cases involving the great general provisions, such as the due process clause of the Fifth Amendment and the due process and equal protection clauses of the Fourteenth. I am afraid that those making the proposal are so blinded by a few mistaken decisions of the court under these provisions that they fail to grasp the philosophy underlying the provisions themselves and the importance of maintaining the power of the court to enforce them. It is true of tyranny, just as it is of fraud, that no one can foresee the form it may take; and, just as in the case of fraud the courts refuse to limit themselves by a definition, so in guarding against tyranny the people have inserted in the fundamental law these provisions which are broad enough to cope with tyranny wherever and however it may arise. Who would have imagined that it would be necessary to appeal to the federal Constitution to preserve religious liberty in education from impairment by one of the states? But the occasion arose a few years ago; and the Supreme Court, in Pierce v. Society of Sisters[30] found the power to prevent this act of tyranny in the due process clause of the Fourteenth Amendment. A little later the same clause was invoked to protect the freedom of the press from impairment by the state of Minnesota[31] and to prevent the Long machine from destroying the freedom of the press in Louisi-

29. See address of Hon Robert H Jackson, Attorney General, before the Boston College Law School on April 9, 1940, entitled "A Square Deal for the Court".

30. 268 U. S. 510.

31. Near v. Minnesota, 283 U S. 697.

ana.[32] In 1936, it was invoked to protect freedom of speech in Georgia [33] and last year to protect freedom of assembly in New Jersey.[34] And last February it was invoked to set aside a conviction in Florida based upon testimony wrung from an accused by torture.[35] At a time when tyranny seems to have experienced a world wide revival and new forms of oppression are being invented to outrage man's sense of justice, we should hesitate long before abandoning these guarantees, under which any citizen of the republic may invoke the power of the judiciary to protect him against arbitrary exercise of governmental power.

It is objected that the interpretation of the general clauses involves the application of the social philosophy of the judge and enables him to substitute his personal will for the will of the people. This is not a fair statement. It is true that in condemning legislation as lacking in due process or equal protection, the judge must apply standards of reasonableness; but these standards are supposed to be, and generally are, those of the age in which he is living, and not his personal views. The court may make mistakes in determining or applying standards; but where the final appeal is to reason, as it is under our judicial system, mistakes will be corrected when reason has time to assert itself. The truth of the matter, of course, is that the standards by which the reasonableness of legislation is to be determined, the norms of conduct for the state, change with the changing conditions of society and it is important that judges keep step with the times; but it is infinitely better that reform be delayed for a few years than that we surrender the safeguards against tyranny which

32. Grosjean v. American Press Co., 297 U. S. 233.
33. Herndon v. Lowry, 301 U S. 242.
34. Hague v. C. I. O., 307 U. S. 496.
35. Chambers v. Florida, 309 U. S. 227, 60 S. Ct. Rep. 472.

are contained in the right of the court to enforce the great general clauses of the Constitution.

In this connection, it must be remembered that the power of the courts is purely negative. They have no power to make laws or to enforce them. Where rights under a statute are asserted, or where effort is made to enforce the statute and rights under the Constitution are claimed inconsistent therewith, the extent of the power of the court is to protect the rights asserted under the Constitution and declare the statute void in so far as it infringes these rights. It may not enact another statute or otherwise change the law. Even in the case of erroneous decision it merely delays action, and talk of judicial tyranny is nonsense. The income tax decision [36] delayed the income tax only twenty years and the Adkins [37] case held back minimum wage legislation for a less period than that. In this connection let me quote again from No. 78 of the Federalist:

> "Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolu-

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36. Pollock v. Farmers Loan & Trust Co., 158 U. S. 601, decided 1895, nullified by 16th Amendment adopted in 1913.

37. Adkins v. Children's Hospital, 261 U. S. 525, decided 1923, overruled by West Coast Hotel Co v. Parrish, 300 U. S. 379.

tion whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

You will search history in vain for any instance where tyranny or despotism has been established by a court; and on the other hand, one of the first steps in the establishment of a despotism is to limit the power of the judiciary.

What then of proposals to require the concurrence of more than a majority of the judges of the Supreme Court for declaring an act unconstitutional? A statute to this effect would, of course, be unconstitutional since it would be legislative invasion of the judicial function. And a constitutional change making such a provision would be most unwise. The court should act as a body; and to permit a legislative act to prevail because supported by two or three judges when the majority of the court deems it violative of the fundamental law would tend to destroy respect for the legislation and for the processes of government. The Supreme Court should be composed of judges drawn from all sections of the country and representing different points of view. It is but to be expected that they should differ from time to time on constitutional questions; and the only safe thing to do is to let the decision of the majority be the decision of the court. Errors will be made under any system; but there is less danger to the Republic in allowing a majority of the court to invalidate a statute than in allowing a minority to invalidate the Constitution. The verdict of history is that even in the five to four decisions the majority of the court have generally been right; and nothing is to be gained by giving a minority the right to nullify not only the will of the majority on grave constitutional questions, but, if the majority be right, to nullify the Constitution itself.

4. OUR DUAL SYSTEM OF COURTS.

In connection with the function of the judiciary in securing government by law, consideration must necessarily be given to the dual system of courts prevailing under our federal system. It is clear, of course, that courts must be established by the states, which are clothed with general governmental powers under the Constitution; and but little thought is needed to perceive that a system of federal courts is equally necessary. Laws do not enforce themselves. They must be enforced ordinarily by court proceedings of some character; and it is essential to the very existence of the federal government that it have a system of courts of original jurisdiction into which it may go to enforce its laws. Its impotence if it were compelled to go into state courts to prosecute crimes against the revenue or the currency or the postal system, not to mention the crime of treason, can readily be imagined. Aside from the fact that the doors of the state courts might not be open to it, the local prejudice which it might encounter in its efforts to enforce legislation of national importance renders a system of courts inferior to the Supreme Court a matter of absolute necessity. I take it that there can be no question, therefore, as to the necessity of federal courts having jurisdiction over cases arising out of the constitution and laws of the United States. A branch of this jurisdiction of peculiar importance in recent years is that relating to review of administrative tribunals. Due process requires that the citizen have opportunity for judicial hearing as to the validity of any action of government by which he is directly affected; and review of the one hundred and fifty odd administrative agencies of the federal government must be provided in the federal courts.

There is another branch of the jurisdiction of the federal courts which is just as important under our federal system as

that to which I have adverted; and that is the jurisdiction arising out of diversity of citizenship. One of the obligations of a sovereign power is to see that its citizens or subjects are justly treated by other governments, their citizens and subjects; and no small part of the business of the state department of any nation consists in negotiation with other nations as to claims of its nationals. Our federal Constitution forbids negotiations of this sort between the several states of the Union. In lieu of the exercise of such power by the states, the federal courts are set up under the government to which the citizens of all states owe allegiance, to afford impartial tribunals for the settlement of disputes between citizens of different states. The state courts cannot properly perform this function because they are set up by and are responsible to the people of the states which create them. If I go into a federal court in New York, it is as much my court as it is the court of a citizen of that state. The judge is appointed by my President, is confirmed by my senate and is subject to have his actions called in question by the senators and representatives whom I vote for, as well as by the senators and representatives who represent my adversary. If I go into a state court in New York, however, I am in a court which represents a sovereignty upon which I have no claim. The judge represents the people of New York, he does not represent me or the people of the state from which I come. Citizenship in the United States is both local and national. For matters involving the local citizenship the local courts are provided. For matters which involve citizens of different states, only the federal courts can furnish to both a tribunal of the sovereignty to which both owe allegiance and to which both look for protection.

I see no valid reason for the destruction of this ancient jurisdiction of the federal courts. I see the strongest reasons

against its destruction, in addition to those based upon constitutional theory already advanced. We in America are engaged in the building of a great nation If we are to be successful we must cultivate a national outlook and we must see that there is the freest communication and intercourse, with unrestricted flow of capital and commerce into the various parts of the Union. Our country comprises a wide expanse of territory with a varied people with widely differing customs and ideals. We will develop commerce in the several states and will facilitate the flow of capital to sections where it is needed only if we maintain the confidence of investors that, when they invest their moneys in distant states or in enterprises serving those states, their rights will be protected by the power of the government of which they are citizens and in which they have confidence. No man in the recent history of our country had a wider knowledge of our national problems or a profounder understanding of our national philosophy than Chief Justice Taft. As Circuit Judge, Secretary of War, President and finally Chief Justice, he knew the country as probably no other American of his generation. Speaking on this subject before the American Bar Association in 1922, he said: [38]

"The theory is advanced that a citizen of one state now encounters no prejudice in the trial of cases in the state courts of another state, and that the constitutional ground for the diverse citizenship of federal courts has ceased to operate. If the time has come to cut down the subject matter of federal judicial jurisdiction, it simplifies much the question of the burden of work in the federal courts, but that has not been the tendency of late years. I venture to think that there may be a strong dissent from the view that danger of local prejudice in state courts against non-residents is at an end. Litigants from the eastern part of

38. Reports of American Bar Association, vol. 47, pp. 258-259.

the country who are expected to invest their capital in the West or South will hardly concede the proposition that their interests as creditors will be as sure of impartial judicial consideration in a Western or Southern state court as in a federal court. The material question is not so much whether the justice administered is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where that capital is needed for the promotion of enterprises and industrial and commercial progress. No single element—and I want to emphasize this because I don't think it is always thought of—no single element in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases."

In addition to being interested in the impartial nature of the tribunal, the citizen who must sue in another state is interested in the trial procedure which is to be applied. Is he to have a trial according to the course and practice of the common law by a jury properly instructed and assisted by the trial judge? Or is his case to be dumped into the lap of the jury with a few general instructions on the law by a judge who is forbidden to array the evidence or to apply the law to the facts of the case on trial? If he must go into a state court, he will find that in 22 of the states the charge of the judge must be given before the arguments of counsel, that in 27 states the charge must be written out and read to the jury, that in 28 states the judge in the charge cannot even state the issues and sum up the testimony, and that in 43 states he cannot comment upon the evidence or is otherwise restricted.[39] This means that in these states the function of

39. Judge Merrill E. Otis, "'Governor of the Trial' or 'Referee at the Game'", Journal of the American Judicature Society, vol. 21, p. 105 et seq.

the judge has been reduced to that of a mere umpire or moderator of a meeting, preserving order and ruling upon the admissibility of evidence, but having little real influence upon the course of the trial. To require a nonresident to try his case in such a tribunal is not only to turn him over to the tender mercies of a local jury, without power in the presiding judge to counteract the appeal to prejudice of local counsel, it is also to deny to him the sort of trial by jury which is guaranteed by the Constitution.[40]

If the necessity for a system of federal courts for the proper working of our federal system be conceded, and I do not see how it can be denied, it would seem to follow that the power of these courts to discharge the judicial function properly must be maintained and that their independence of politics, of group pressure and of the influence of other departments of the government must be secured. Federal judges must decide between conflicting claims of powerful interests, between the nation and the states, between different departments of the government, between the constitutional guaranty of the rights of the individual and legislation enacted as the results of popular demand or powerful group pressure. In making their decisions. they should be absolutely free of fear of punishment or hope of reward. They should not be tempted with the thought that a popular decision may mean re-election or advancement or that an unpopular decision may mean loss of position and financial distress. Experience has demonstrated beyond question, I think, that appointment to hold office for life or good be-

40. Herron v. Sou. Pac. Ry Co, 283 U. S 91, 95; Patton v. U. S, 281 U. S. 276, 288; Capital Traction Co. v. Hof, 174 U S. 1, 13-16; U S. v. Philadelphia & R R Co, 123 U S. 113, 114; U. S. v. Fourteen Packages of Pins, 1 Gilp. 235, 25 Fed. Cas (No. 15,151) 1182, 1189.

havior with guaranty that salary will not be reduced, is necessary if we are to secure able lawyers for judicial service and if the country is to be guaranteed independence of judicial action. Proposals such as popular election or appointment for limited terms would prove ruinous. The experience of the states with popular election of judges has sufficiently demonstrated the vice of that system; and the proposal of appointment for limited terms is even more undesirable. No successful lawyer would be willing to surrender his practice for the modest salary paid by a judgeship, if the prospect were that he must surrender the position in a few years and start out again to establish a practice anew. And it would be difficult for a judge, approaching the end of a term and faced with the problem of re-establishing himself in the practice, to take no thought of his future or to prevent it from unconsciously coloring his decisions. Either plan would throw the national judiciary into the welter of politics.

5. LAW IN INTERNATIONAL RELATIONS.

So far, we have considered government by law as confined to the internal affairs of the nation. A consummation devoutly to be wished is that law might prevail in international relationships. It is a mistake, of course, to think that there is no such thing as international law because there is no machinery for enforcing it, or that international law is destroyed by reason of the fact that it is violated. This is the fallacy which we have met several times already, the fallacy of confusing law with the authority which enforces it. Under the conditions of modern life, nations must deal with each other and the nationals of one nation must deal with the nationals of other nations. The idea of a self contained and isolated economy for any civilized nation in the modern world is out of the question. The relations had between different nations

or their nationals give rise to rules, the nature of which is prescribed by the nature of the relations themselves, and is the result of reason as applied to them in an effort to arrive at what is just and right. There has thus grown up a great body of rules and precedents which are accepted as binding law, and are enforced as such, by the courts of civilized nations, whenever cases arise in which they are applicable. They are recognized as binding also in controversies between nations which are submitted to arbitration or to decision by the Court of International Justice at The Hague. More and more, reason is supplanting force in the settlement of international controversies; and it is not too much to hope, even in the face of present conditions, that, with the upward progress of the race, law will eventually prevail in international relationships, as well as within nations. Peace between nations, like government within nations, must rest upon both reason and force, reason to evolve the just rule of law applicable in the premises and force to give the rule effect; but I do not doubt that the time will come when the force of the international community will be directed by reason rather than by arbitrary will, and that the reign of law in international relationships will be established just as it has been established in the life of our nation. I have not yet lost the hope that, in the fullness of time, the race will evolve a civilization

"Where the common sense of most shall hold a fretful realm in awe."

6. THE FUTURE OF DEMOCRACY.

Democracy, the philosophy of life based upon the worth and importance of the individual, is essential to the happiness and progress of the race. Government is the organization of social life; and should embody the principles of this philos-

ophy. Since democracy recognizes the worth and importance of the individual, democratic government must guarantee to him the enjoyment of those rights essential to the development of his personality and protect them from the crushing power of the state. It must also accord to him participation in the governmental process. Democracy in government thus requires that the people themselves exercise sovereignty, but this they can do effectively only through the representative system, in which government is administered by agents representative of the people in whom the sovereign power resides. The federal system, by providing different governmental agents for local and national governments secures to the people the right of local self-government while developing national power. Division of power between the three branches of government, with a system of checks and balances, prevents the agents of the people arrogating sovereign power to themselves. Basic in this idea of democratic government is the concept of government by law, which is essential to the preservation of individual rights and the exercise of popular sovereignty as well as to the working of the federal system.

This is democracy in America—the American system of individual liberty and free enterprise—liberty under law and cooperation for the common good. We are told, by Communists, Nazis and Fascists, that the system is a failure. The record answers them. A hundred and fifty years ago, America was a group of thirteen poverty stricken states along the Atlantic with a total population less than half that of the present city of New York. In a century and a half her boundaries have stretched across the continent and a hundred and thirty million souls live beneath her flag. Not only has she become the richest and most powerful nation on the face of the earth, but, what is more important, she has given to

the average man the best chance in life that he has ever had in the whole history of the human race. Communism has meant the liquidation of the Kulaks and the murder of industrial as well as political and military leaders. Nazism has meant the persecution of the Jews and the destruction of Poland. Fascism has meant the rape of Ethiopia. But democracy in America has meant that beneath her flag there has been more of security, more of liberty, more of opportunity and more of happiness than could be found anywhere else under God's shining sun. "By their fruits ye shall know them. Men do not gather grapes of thorns or figs of thistles."

But democracy cannot stand still. It is called ever to aid in solving the new problems which arise in life. We must make the world safe for democracy. We must also make democracy safe for the world. We must improve our governmental processes so that they will meet the needs of the hour and will aid us in achieving a higher and fuller life for all the people. We must realize that it is not enough that men be free. They must find in their freedom opportunity for development and happiness and security. These will come with the working out of the democratic ideal, which finds the glory of the state in the dignity and happiness of the individual.

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